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Supreme Court, U.S.
FILED

101100 MAR 7 - 2011

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.

Petitioners

v.

KAMEHAMEHA SCHOOLS/ BERNICE PAUAHI BISHOP ESTATE, ET AL.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents proudly admit that they operate a system of racially segregated private schools. Petitioners are four children who challenged respondents' racially exclusionary admission policy as a violation of 42 U.S.C. § 1981, the Nation's oldest civil rights law.

Although petitioners willingly revealed their identities to respondents under a protective order entered by the district court, petitioners otherwise sought to shield their identities from the public by litigating this action using pseudonyms. The court of appeals

> —acknowledged that individuals who challenge respondents' locally popular admissions policy face "undoubtedly severe" threats of *physical* retaliation;
>
> —found that any prejudice to respondents from permitting petitioners to use pseudonyms here was "minimal" or "doubt[ful]"; and
>
> —concluded that permitting petitioners "to use pseudonyms [would] serve the public's interest in this lawsuit by enabling it to go forward."

The court of appeals nevertheless affirmed the district court's refusal to allow petitioners to use pseudonyms and its consequent dismissal of petitioners' claims with prejudice.

The question presented is whether the decision of the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by [the district] court, as to call for an exercise of this Court's supervisory power." Rule 10(a).

PARTIES TO THE PROCEEDINGS

The four petitioners, who were plaintiffs and appellants in the lower courts, are as follows:

—Jacob Doe and Janet Doe, minors, by their parents and next friends, James and Joyce Doe;

—Karl Doe, a minor, by his parents and next friends, Kirk and Kate Doe; and

—Lisa Doe, a minor, by her mother and next friend, Laura Doe.

The six respondents, who were defendants and appellees in the lower courts, are Kamehameha Schools/Bernice Pauahi Bishop Estate and its five trustees, i.e., Nainoa Thompson, Diane J. Plotts, Corbett A. K. Kalama, Robert K. U. Kihune, and J. Douglas Ing. Petitioners sued each trustee solely "in his capacity as Trustee" of Kamehameha Schools/Bernice Pauahi Bishop Estate. App. 1a.

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PETITION FOR WRIT OF CERTIORARI

Jacob and Janet Doe, Karl Doe, and Lisa Doe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 596 F.3d 1036. The order of the court of appeals denying rehearing en banc (App. 65a-66a) and the opinions dissenting from and concurring in the denial of rehearing (App. 66a-98a) are reported at 625 F.3d 1182. The three orders of the district court for the District of Hawaii (App. 20a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2010. *See* App. 2a. That court denied petitioners' timely petition for rehearing en banc on November 8, 2010. *See* App. 65a-66a. On February 1, 2011, Justice Kennedy granted an extension of time, to and including March 7, 2011, to file the petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Two provisions of the Federal Rules of Civil Procedure played roles in the proceedings below:

> **Rule 5.2. Privacy Protection For Filings Made with the Court**
>
> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification

number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

Rule 10. Form of Pleadings

(a) CAPTION; NAMES OF PARTIES. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

STATEMENT OF THE CASE

1. Respondents are Kamehameha Schools/Bernice Pauahi Bishop Estate ("KSBE") and its five incumbent trustees. KSBE dates from 1884, when "Princess Bernice Pauahi Bishop, the last descendant of the Hawaiian monarchy, established two schools and a testamentary trust to fund them." App. 3a. Since then, the schools have "expanded to three K-12 campuses, and the trust totaled $9.1 billion in 2008." *Id.* By its own measure, KSBE "is the largest private landowner in the state of Hawaii." http://www.ksbe.edu/about/facts.php (visited Mar. 2, 2011).

The salient aspect of KSBE is its "publicly acknowledged" admissions policy, which is "to grant admission to any applicant with any amount of Native Hawaiian blood *before* admitting other applicants." App. 4a (emphasis added). In practice, however, *before* now means *to the exclusion of*: when KSBE "voluntarily admitted one non-Native applicant . . . in 2002, . . . ensuing protests prompted [KSBE] to amend its admissions policy" in a manner that "effectively ensur[es] that there would *never again* be an insufficient number of qualified Native-Hawaiian applicants." *Id.* (emphasis added). Thus, but for the one voluntary admission in 2002 and one admission pursuant to a settlement in the face of a preliminary injunction in 2003, *see* App. 4a-5a, no non-Native Hawaiian has been admitted to Kamehameha Schools in the past half-century. *Accord* App. 4a ("[S]ince 1966, only two non-Native Hawaiians have been admitted.").

From 2003 to 2007, KSBE's admissions policy was subjected to attack in the federal courts as a violation of 42 U.S.C. § 1981. *See generally Doe v. Kamehameha Schools / Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007). Both of the lower courts ruled against the plaintiff and upheld KSBE's admissions policy. *See ibid.* While this Court was considering the plaintiff's subsequent petition for certiorari (which was relisted three times), the case settled. *See* App. 5a.

The salient aspect of that litigation—labeled "*Doe I*" by the court below—was that it was brought by "John Doe, a minor, by his mother and next friend, Jane Doe." *See, e.g.*, 470 F.3d at 827. None of the courts that superintended the *Doe I* litigation—from district court to the three-judge panel of the court of appeals to the 15-judge

en banc court of appeals to this Court—ever expressed the slightest interest in (let alone concern regarding) the plaintiff's use of a pseudonym. Likewise, KSBE itself "never objected to the fact that the plaintiff proceeded anonymously" in *Doe I*. App. 5a.

2. The present case began in 2008, when the four petitioners (from three separate families, none related to the plaintiff in *Doe I*) filed a complaint in the district court that was essentially identical to the complaint in *Doe I*—asserting a single claim that KSBE's racially exclusionary admissions policy violated 42 U.S.C. § 1981 and seeking both declaratory and injunctive relief and damages. Just as in *Doe I*, each petitioner "is a minor who brings this action by his or her respective parent or parents as next friend(s)"; each petitioner "is 'Hawaiian' in that he or she is a citizen and resident of the State of Hawaii, but no [petitioner] is of 'Hawaiian ancestry' as defined by KSBE." 2 E.R. 300 (¶ 5 of complaint).[1]

While the same in substance as *Doe I*, the present case took a markedly different procedural path. As the court of appeals described it, the case "quickly became mired in procedural conflict": even though petitioners' "names were told to Kamehameha's counsel and some staff under a protective order," KSBE immediately "objected to [petitioners'] request for anonymity" vis-à-vis the general public. App. 5a & n.2. Thereafter, relying on the governing circuit precedent regarding the use of pseudonyms, i.e., *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000), petitioners "moved for leave to proceed anonymously." App. 5a.

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[1] "E.R." refers to the two-volume Excerpts of Record filed by petitioners in the court of appeals in June of 2009.

a. In their motion, petitioners "argued that they reasonably fear physical injury if their identities are revealed." *Id.* Petitioners supported that argument with some 175 pages of materials, including declarations from a parent of each petitioner and 20 exhibits. *See* 2 E.R. 170-297 (reproducing much of district court docket entries 13 to 13-26, filed Aug. 29, 2008). As for what those materials showed, we can do no better than quote from the decision below (all emphases added):

- After the district court issued an injunction ordering Kamehameha Schools to admit a non-Hawaiian student in 2003, "the U.S. Attorney for Hawaii noted a 'growing sense of anger and rage' and threats of '**kill haole day everyday**,' prompting him to warn the public that **violence or threats of violence** based on race are federal offenses." App. 6a; *cf. id.* n.3 ("'Kill haole day' is an unofficial tradition in Hawaiian public schools when some Native Hawaiian children '**beat[] up** Caucasian students on the last day of school.'").

- In a declaration made under penalty of perjury, the mother of the *Doe I* plaintiff "recounted that after the amount of the *Doe I* settlement was leaked to the Honolulu press, there were calls to '**break** [the plaintiff's and his attorney's] **every bone and make [those] bastards suffer**.' Others stated that 'now the boy will have to pay' because they knew people 'who want to **kick this boys** [sic] ****.' Still others urged that the identities of the *Doe I* plaintiff and his mother be exposed to force them 'to stand up and face those that they are robbing.' She stated that because of these threats, she and her son would '**fear for [their] safety** if [their] identities [were] made public' and that they were '**prepared to move and**

go into hiding' if their identities were revealed." App. 6a (brackets by the court).[2]

- The filing of petitioners' own complaint in August of 2008 immediately generated numerous "internet postings regarding their lawsuit. One posting predicted that if the plaintiffs were admitted to Kamehameha [Schools], they were 'jus gonna **get lickins everyday**.' Another posting warned that if plaintiffs' 'haole attorneys continue doing this, one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians **armed with baseball bats or guns**.'" App. 6a-7a.

- The past several years in Hawaii have witnessed an extraordinary number of "**violent crimes with racial overtones**"; in at least three of these crimes, "young children **severely injured** their non-Native classmates [causing dislocated jaws, black eyes, and head gashes], calling the victims derogatory names related to their skin color, especially '**f------ haole**.'" App. 7a; *see also* 2 E.R. 225, 234-35 (exhibits).

b. The assigned magistrate judge denied petitioners' motion for leave to proceed anonymously. *See generally* App. 47a-64a. The judge's written order induced immediate reaction from members of the public. Again, we can do no better than quote from the decision below (all emphases added):

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[2] The decision below did not mention another of the public statements recounted in the declaration and brought to the attention of the courts below, namely: "Seriously...Lawyers like Grant [the Does' counsel] should be killed off..." 2 E.R. 241, ¶ 10 (declaration of Jane Doe). This declaration was *not* procured by petitioners' counsel. *See* 2 E.R. 238.

- "Later that afternoon, two [Honolulu] newspapers published stories reporting on the magistrate judge's order. The online forums of each newspaper generated myriad comments," including: "Good that the judge ordered them to make these little brats [sic] names known to the public, **so they can be tormented** by their fellow students and general public'"; the "**4 kids . . . will need 10 bodyguards** lol"; "**Sacrifice them!!!!!!!!**"; "**stringing up those scum lawyers** is not such a bad idea"; and "if their names were revealed, the plaintiffs 'would have to **watch their backs** for the rest of their lives!'" App. 7a-8a.[3]

- One of petitioners' counsel, David B. Rosen, "received a phone call on the afternoon the magistrate judge's decision was filed. The caller warned that 'everyone is going to know who your clients are. Now, both you **and your haole clients** can **get the lickins' you deserve**. Why do you **f[ucking] haoles** even come to Hawaii?'" App. 8a; *see also* 2 E.R. 131, ¶ 3 (Rosen declaration).

- Rosen "also received an email: 'You are a son of a bitch . . . I know so many kids that did not get into kamehameha schools with Hawaiian blood and you are trying to take that away . . . I am tired of haoles like you. **yOU JEWISH SHITHEAD!!!!** if i see you ever in public..no worries . . . I will SPIT on you . . .

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[3] Petitioners brought to the attention of the lower courts the fact that the stories in both Honolulu newspapers ran on their respective front pages, and that one of the stories included photographs of the magistrate judge and of petitioners' two counsel. *See* 2 E.R. 131, ¶ 2 (declaration of David B. Rosen); 2 E.R. 105 (*Honolulu Advertiser* story).

> and YOU will throw the first punch . . . and believe me . . . it will be my pleasure to **beat the crap out of you** . . . by the way . . . i am a NON Hawaiian . . . .'" App. 8a (ellipses in original).

Citing these and other reactions to the magistrate judge's order, petitioners brought a timely motion for reconsideration of the order. *See* App. 7a. The magistrate denied that motion as well. *See generally* App. 38a-46a.

c. Petitioners timely requested the assigned district judge to review the magistrate judge's two rulings. *See* App. 9a. The district judge affirmed both rulings. *See generally* App. 20a-37a.

The collective effect of the proceedings in the district court on petitioners' motion for leave to proceed anonymously was to put petitioners to the choice either "to file an amended Complaint disclosing their identities" or to have "their claims . . . dismissed with prejudice." 2 E.R. 58, ¶ 3 (district court-approved stipulation). Continuing to fear for their safety, petitioners chose the latter: "Rather than disclose their names, [petitioners] suffered dismissal with prejudice with leave to appeal, giving us jurisdiction under 28 U.S.C. § 1291." App. 3a.

3. The court of appeals affirmed. *See* App. 1a-19a.

a. Before reaching the substance of the anonymity issue, the court of appeals addressed the fact that the "district court ruled against [petitioners'] motion to proceed anonymously on two procedural grounds." App. 9a n.4. But the panel expressly "reject[ed]" both grounds, *id.*, and accordingly held that petitioners "did not procedurally default," meaning that "they properly appealed consideration of all the factors relevant to a motion to proceed anonymously." App. 10a n.5.

b. On the merits, the panel analyzed petitioners' requested use of pseudonyms under the rubric of three factors: public interest, reasonable fear of severe harm, and prejudice to respondents.

As for public interest, the panel acknowledged that most considerations *favored* the use of pseudonyms:

- "[I]t is difficult to see how disguising [petitioners'] identities will obstruct public scrutiny of the important issues in this case."[4]
- "[W]e recognize that the fact that the public . . . has an interest in seeing this case decided on the merits weighs in favor of allowing anonymity."
- "[T]he district court's finding that this case presents extremely controversial and very important issues in Hawaii weighs in favor of allowing the Doe children to proceed anonymously."
- "Because the case was dismissed for failure to include the plaintiffs' names in the complaint, permitting the plaintiffs to use pseudonyms [would] serve the public's interest in this lawsuit by enabling it to go forward."

App. 12a-13a (internal quotation marks omitted).

Against these concrete and case-specific considerations, the panel posited "[t]he normal presumption in litigation . . . that parties must use their real names," a presumption that "is loosely related to the public's right to open courts." App. 11a (citing, *inter alia*, Fed. R. Civ.

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[4] In particular, the panel *rejected* the district court's conclusion that "the public scrutiny of the Doe children's standing would be impaired by anonymity." App. 12a.

P. 10(a)). This right assertedly derives from a "general right to inspect and copy public records and documents, including judicial records and documents," along with the Ninth Circuit's "general history of access." App. 11a-12a (quoting *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

The panel did not attempt to reconcile these concededly "general" considerations with the case-specific ones listed above. Rather, the panel punted: "we cannot say that the district court abused its discretion by concluding that this factor favors [respondents]." App. 13a.

As for reasonable fear of severe harm, the panel acknowledged that "these threats of physical retaliation," *see supra* pp. 5-8, "are undoubtedly severe." App. 14a. The panel further acknowledged that "there are several facts militating in favor of a finding that the Doe children's fears are reasonable." App. 15a. For example, the litigation's "context no doubt includes random acts of racial violence against non-Native Hawaiian children . . . amplified by calls for 'kill haole day everyday,' when a non-Native was recently admitted to Kamehameha." App. 16a. Moreover, "the U.S. Attorney for Hawaii did not laugh or dismiss the calls for 'kill haole day' . . . [but instead] issued a strongly worded warning, reminding the public that threats based on race are a federal felony. Likewise, many of the 'listeners' responding to the internet postings took the comments very seriously." *Id.*

Nevertheless, the panel was able seemingly to explain away all of this "context" by treating each threat in isolation and showing that no one threat was unimpeachable. *See* App. 16a-17a. Using this methodology, the panel was able to say that the "district court did not abuse its discretion in concluding that the Doe children's fears of severe harm are not reasonable." App. 14a.

As for prejudice to *respondents* from shielding petitioners' identities from the *public*, the panel essentially found it to be "minimal" or "doubt[ful]." App. 18a & n.7.

In the end, the panel opined that "[h]ad the district court found that anonymity was appropriate, we likely would have" affirmed that finding. App. 19a. The panel similarly opined that were it "permitted to make findings and weigh the factors anew, we might have held that anonymity here was appropriate." *Id.* But applying an abuse-of-discretion standard, the panel "affirm[ed] the district court's order dismissing the case based on [petitioners'] failure to disclose their identities." *Id.*

4. Petitioners timely petitioned for rehearing en banc; their petition was denied. *See* App. 65a-66a.

a. Chief Judge Kozinski dissented. *See generally* App. 66a-69a. Recounting some of those threats documented above, he avowed that if "threats like that were made against me or my family, I'd be worried," and "I'd call the U.S. Marshals, as federal judges are repeatedly cautioned to do when targeted by a threat." App. 67a. Judge Kozinski believed that "the federal courts must be safe havens for those who seek to vindicate their rights. No litigant should fear for his safety, or that of his family, as a condition of seeking justice." *Id.* Because judges should not "have a double standard—one for ourselves and another one for the parties before us"—he had "no difficulty concluding that the district court here egregiously abused its discretion when it denied [petitioners] the right to proceed as Does." App. 68a.

Judge Kozinski then discussed Federal Rule of Civil Procedure 5.2(a), based on which he was "confident that the district court will set aside the dismissal of petitioners' claims; "it would be a travesty if it did not." *Id.* He

found it "passing strange that the district judge, the magistrate judge and their staffs all overlooked a rule of which they are reminded every time they" access court records electronically. *Id.* He opined that petitioners "should not be denied a chance to vindicate their rights because the court blundered its responsibility to ensure the parties safeguard the identities of minor children, as mandated by Rule 5.2(a)." App. 69a.

Judge Kozinski ended with the point that "[s]etting aside the district court's judgment and proceeding under Rule 5.2(a) should also be desirable from the perspective of [respondents]. The difficult legal issue that lies at the heart of this dispute was resolved in its favor in our en banc court by the narrowest of margins. The issue will remain unsettled until the Supreme Court has had an opportunity to address it." *Id.* (citations omitted). He therefore advocated "reinstating [petitioners'] complaint under the protective umbrella of Rule 5.2(a) so this uncertainty can be resolved once and for all." *Id.*

b. In an opinion joined by Judge Kozinski, Judge Reinhardt also dissented. *See generally* App. 70a-90a. In his view, the panel "inexplicably and contrary to all precedent holds that a district judge acts within his discretion when, in a racially charged environment, he requires juveniles to publicly disclose their names, and put their physical and mental well-being at risk, in order to bring a civil rights lawsuit in federal court." App. 70a. Like Judge Kozinski's opinion, Judge Reinhardt's opinion confronted Rule 5.2(a), including by responding at length to the panel's treatment of the rule in its concurring opinion (discussed below). *See* App. 74a-78a, 88a-90a. He pointed out the irony of the panel's affirming the ruling against petitioners "[d]espite expressing serious skepticism about the district judge's reasoning at

every turn." App. 81a. This result cannot be justified by the standard of review: "Abuse of discretion surely has limits. Discretion does not include the right to be wrong about everything." App. 82a.

c. In a jointly signed opinion, all members of the three-judge panel reaffirmed their workmanship. *See generally* App. 90a-98a. Part I of the opinion was devoted to Rule 5.2(a), the panel concluding that the rule "in no way undermines our [original] opinion." App. 92a. The panel ended its opinion by circling back to the consideration it had found so important in connection with the public interest: "it is clear that there remains a presumption against anonymity." App. 98a.

REASONS FOR GRANTING THE PETITION

It is perhaps a rare case in which Judges Kozinski and Reinhardt agree on a controversial issue, but this is one. Their agreement is all the more striking given that the two strenuously *dis*agreed in *Doe I*, wherein Judge Reinhardt joined both the majority and concurring opinions, while Judge Kozinski authored his own dissenting opinion and joined all three other dissents. *See* 470 F.3d 827 (9th Cir. 2006) (en banc). Both judges are correct here. Judge Kozinski is correct that "the federal courts must be safe havens for those who seek to vindicate their rights" and that "[n]o litigant should fear for his safety, or that of his family, as a condition of seeking justice." App. 67a. Judge Reinhardt is likewise correct that it is inexplicable and contrary to all precedent for a district court, "in a racially charged environment," to obligate "juveniles to publicly disclose their names, and put their physical and mental well-being at risk, in order to bring a civil rights lawsuit in federal court." App. 70a.

It is well-established that this Court "has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of . . . procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). The Court will not hesitate to grant review and exercise that authority if necessary to "ensur[e] compliance with proper rules of judicial administration." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (per curiam). Indeed, the need for the Court to exercise supervisory authority in those cases where a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," is an express consideration in the Court's exercise of its certiorari jurisdiction. Rule 10(a), *cited in Hollingsworth*, 130 S. Ct. at 713.

This is such a case from the Ninth Circuit. As documented above and elaborated below, that court crafted restrictions on using pseudonyms that will severely and unfairly stifle prosecution of legitimate federal claims by vulnerable plaintiffs. In so doing, the Ninth Circuit advanced a conception of "public interest" that has no basis in this Court's decisions or in the usual practice of this Court and other courts, while simultaneously denigrating the child-protecting policies embodied in a rule of procedure promulgated by this Court and approved by Congress. In so doing, moreover, the court of appeals sanctioned the district court's refusal to permit the use of pseudonyms in nothing less than compelling factual circumstances for such use.

Plenary review or summary reversal is accordingly warranted.

I. The Ninth Circuit So Far Departed from Sound Judicial Practice as to Call for an Exercise of This Court's Supervisory Power.

This Court's Rule 10(a) refers to a court of appeals having departed from "the accepted and usual course of judicial proceedings." That exact phrase appears only rarely in this Court's opinions. *See, e.g., Hollingsworth*, 130 S. Ct. at 713 (quoting rule in granting stay application); *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 74 (2003) (granting petition for certiorari to determine whether Ninth Circuit so departed). More often, the considerations encapsulated by this phrase are captured by the term *sound judicial practice*. The Court has repeatedly referred to "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *E.g., Thomas v. Arn*, 474 U.S. 140, 146 (1985) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). More recently, the Court has affirmed that, as part of its supervisory authority over the federal judicial system, it "can establish rules of 'sound judicial practice.'" *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004). Finally, and most pertinent at this petition stage, the Court has granted certiorari when the court of appeals' decision seemed "at odds with sound judicial practice." *United States v. Stanley*, 483 U.S. 669, 676 (1987).

The decision of the Ninth Circuit here was at odds with sound judicial practice—and thereby far departed from the accepted and usual course of judicial proceedings—in two important respects. First, the court of appeals overvalued what it called the public's generalized right to "open courts." Second, and at the same time,

the court of appeals undervalued both the privacy and security concerns embodied in Federal Rule of Civil Procedure 5.2(a).

A. Overvaluing "Open Courts"

In discussing "the public interest" as it bears on the right to litigate in federal court using pseudonyms, the Ninth Circuit found that all but one of the relevant considerations actually favored *petitioners*. *See supra* p. 9. The sole consideration on the other side was what the Ninth Circuit labeled "the public's right to open courts." App. 11a.[5] Necessarily, then, that right alone was decisive in the court of appeal's affirmance of the district court's conclusion that the public-interest factor favored *respondents*. *See* App. 13a. Indeed, the court of appeals trumpeted "the *paramount importance* of open courts." App. 18a (emphasis added).

In elevating "open courts" to be a "paramount" consideration against permitting pseudonyms, the Ninth Circuit departed from sound judicial practice and from the accepted and usual course of judicial proceedings. Consider first the articulated basis for the public's right to open courts: the court of appeals began—and ended—its analysis by citing its own previous recognition of a "general right to inspect and copy public records and documents, including judicial records and documents," along with its "general history of access." App. 11a-12a

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[5] The court of appeals also referred to "the right of private individuals to confront their accusers." App. 11a. Because petitioners' true names "were told to [KSBE's] counsel and some staff under a protective order," App. 5a n.2, it is difficult to conceive how this right of confrontation is implicated here. Perhaps for this reason, the court did not further refer to the point.

(quoting *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

The first quotation from *Kamakana* is just a direct quotation from this Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). *Nixon*, however, was careful to warn that the right to inspect and copy judicial records is *not absolute*"; indeed, that point was "uncontested." *Id.* at 598 (emphasis added). More generally, *Nixon* observed that the right of access is an "infrequent subject of litigation," so that "its contours have not been delineated with any precision." *Id.* at 597. The Ninth Circuit had no warrant to transform what in this Court is a generalized, non-absolute, little delineated right of access to judicial records into a paramount consideration against permitting pseudonyms.

The Ninth Circuit's departure from the accepted and usual course of judicial proceedings becomes even more apparent when we consider the alleged "general history of access" as it bears on permitting pseudonyms in particular. We begin with the practice in this Court. Just last Term, the Court considered whether the disclosure of signers' names and addresses under the Washington Public Records Act would "violate the First Amendment with respect to referendum petitions in general." *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010). Although that particular question was answered squarely in the negative, *see id.*, the case yielded no fewer than seven opinions as the Court grappled with important First Amendment issues. But what the Court did *not* grapple with—what *no* opinion even bothered to mention—was the fact that all of the individual plaintiffs litigated the entire case using pseudonyms, from the district court to the Ninth Circuit to this Court. That is to say, pseudonyms were literally a non-issue in this Court.

Doe v. Reed is the latest example of a long-standing practice in this Court. *See also, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam) (pseudonymous police officer's challenge to termination of employment); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (pseudonymous students' challenge to public high school's "football prayer policy"); *Honig v. Doe*, 484 U.S. 305 (1988) (pseudonymous student's challenge to district's policy of excluding disabled children from classroom for dangerous or disruptive conduct); *Plyler v. Doe*, 457 U.S. 202 (1982) (pseudonymous children's challenge to exclusion of illegal aliens from public schools); *Roe v. Wade*, 410 U.S. 113 (1973) (pseudonymous woman's challenge to criminal abortion statute). In most cases, as in *Doe v. Reed*, the pseudonyms generate no comment at all. In other cases, the Court has occasion to mention their existence, usually with a positive connotation. *See, e.g., Santa Fe Independent School District*, 530 U.S. at 294 (noting with evident approval that the district court "permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment"); *Roe*, 410 U.S. at 124 ("Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person.").

The practice is hardly different in the lower courts. Barely a week after the panel's decision in the present case, another panel of the Ninth Circuit issued a decision on the constitutionality of the Pledge of Allegiance. Except for the first-named plaintiff (who was determined not to have standing), all of the plaintiffs used pseudonyms: Pat Doe, Jan Doe, DoeChild, Jan Poe; PoeChild; RoeChild-1, Jan Roe, and RoeChild-2. *See Newdow v. Rio Linda Union School District*, 597 F.3d 1007, 1007 (9th Cir. 2010); *cf. id.* at 1016 (affirming Michael Newdow's lack of standing). In all of the 193 pages of slip

opinions generated by the case, no member of the panel even thought to comment on the plaintiffs' pseudonyms. Countless published opinions of the court of appeals are similar in this regard.[6]

As a final example, we would again cite the earlier case challenging KSBE's admissions policy. *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007). None of the two dozen judges and Justices before whom that case was pending over the course of four years ever expressed any interest in, let alone concern over, the fact that the plaintiff and petitioner was "John Doe, a minor, by his mother and next friend, Jane Doe."

We do not suggest by these citations that either this Court or other courts have, by their silence, sanctioned the use of pseudonyms regardless of the circumstances.

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[6] *See also, e.g., Preschooler II v. Clark County School Board of Trustees*, 479 F.3d 1175 (9th Cir. 2007) (pseudonymous action arising out of alleged physical abuse of disabled child in public school setting); *Doe v. Hawaii Department of Education*, 334 F.3d 906 (9th Cir. 2003) (pseudonymous action against school administrator who taped student's head to tree for disciplinary reasons); *Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999) (en banc) (pseudonymous challenge to school district's policy permitting student prayers at high school graduations); *Doe v. Arizona Department of Education*, 111 F.3d 678, 679 (9th Cir. 1997) (pseudonymous challenge to department's failure to provide for special education needs of incarcerated juveniles); *Doe ex rel. Doe v. Petaluma City School District*, 54 F.3d 1447 (9th Cir. 1995) (pseudonymous action against school district and high school counselor for alleged failure to prevent peer-on-peer sexual harassment).

But we submit that these citations do show that federal appellate courts (including this Court) routinely adjudicate without comment cases in which pseudonyms are used. In this light, it cannot be said that "the accepted and usual course of proceedings" in the federal system is to treat "open courts" as a "paramount" consideration against permitting pseudonyms. Likewise, it cannot be said that sound judicial practice demands that so-called "transparency and openness" (App. 2a) be subordinated to all other public-interest considerations in evaluating a particular use of pseudonyms.

B. Undervaluing Federal Rule 5.2(a)

If the Ninth Circuit overvalued "open courts" in the pseudonym calculus, at the same time it undervalued the child-protective policies embodied in Federal Rule of Civil Procedure 5.2(a). As we explain, even if there is a "strong general presumption that plaintiffs will conduct litigation under their own names," App. 13a, Rule 5.2(a) *reverses* that presumption in cases where the plaintiffs are minors.[7]

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[7] We acknowledge the fact that "neither party brought [the rule] up before the magistrate judge, the district judge, or in their respective briefs before [the Ninth Circuit]." App. 91a. For two reasons, however, that fact does not preclude petitioners from relying on the rule herein.

First, the question presented is properly conceived of as raising a "federal claim," i.e., the claim that petitioners are entitled as a matter of federal law to litigate this case using pseudonyms. Because that claim was certainly addressed by the courts below—indeed, it was really the *only* matter addressed below—it is properly presented by this petition. Moreover, "[o]nce a federal claim is properly presented, a party can make any argument [in this Court] in support of that claim; parties are not limited to the precise arguments

As quoted above (pp. 1-2), Rule 5.2(a) provides in pertinent part: "Unless the court orders otherwise, in an electronic or paper filing with the court that contains . . . the name of an individual known to be a minor, . . . a party or nonparty making the filing may include only . . . (3) the minor's initials." As stated in the Advisory Committee's notes, Rule 5.2 was adopted (effective December 1, 2007) "in compliance with section 205(c)(3) of the E-Government Act of 2002."[8] That provision, titled "Privacy and Security Concerns," expressly directed this Court to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents."

As finally adopted by this Court through the rulemaking process (and allowed by Congress to take effect without amendment), Rule 5.2 "goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form." Notes of Advisory Committee on 2007 amendments. Although the

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they made below." *Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010). Thus, petitioners may argue from Rule 5.2(a) even though they did not make that argument below.

Second, even if Rule 5.2(a) is considered to be a distinct "issue," the Court's consistent practice "permit[s] review of an issue not pressed [below] so long as it has been passed upon." *Id.* at 892. The panel both construed Rule 5.2(a) and applied it to the facts of the case, *see generally* App. 91a-92a, concluding that the rule "in no way undermines" the panel's affirmance of the district court's refusal to allow petitioners to use pseudonyms, App. 92a. In such circumstances, it cannot be gainsaid that Rule 5.2(a) was "passed upon" below.

[8] Pub. L. No. 101-347, 116 Stat. 2899, 2914-15, *amended by* Pub. L. No. 108-281, 118 Stat. 889 (2004) (codified as amended at 44 U.S.C. § 3501 note).

impetus for Rule 5.2(a) was an Act of Congress, the rule also "is derived from the privacy policy adopted by the Judicial Conference in September 2001"; that policy "requires that documents in case files generally be made available electronically . . . , provided that certain 'personal data identifiers' are redacted in the public file, including . . . the name of a minor."[9]

What we have, then, is a rule of procedure expressly directed by Act of Congress to address "privacy and security concerns" in federal-court litigation. That rule is also derived from a "privacy policy" of the Judicial Conference, which required redacting names of minors from "the public file." The text of that rule generally forbids any electronic or paper filing in a federal court that contains "the name of an individual known to be a minor," mandating instead that a filing include only "the minor's initials." In this light, Chief Judge Kozinski's interpretation of Rule 5.2(a) is compelling: the rule mandates that both courts and parties "safeguard the identities of minor children" in federal litigation. App. 69a. Or, as Judge Reinhardt phrased it, the rule "provides for the anonymity of juveniles in federal litigation." App. 71a.

The panel offered contrary interpretation, namely, that Rule 5.2 provides merely for "veiled identification," not for anonymity. App. 92a. The panel reasoned that because "[t]here are only so many potential litigants" in any given lawsuit, for plaintiffs "to reveal their initials

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[9] Report of the Judicial Conference Committee on Rules of Practice and Procedure 2-3 (Sept. 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2006.pdf. For the Court's role in the process of adopting Rule 5.2, see generally Amendments to Federal Rules of Civil Procedure, 550 U.S. 1003, 1004-05, 1019-20 (2007).

might . . . effectively reveal their identities." App. 91a-92a. Rather than see this unsettling possibility as a fitting occasion for a district court to exercise its express power to "require redaction of additional information," Rule 5.2(e)(1), the panel apparently chose to take it as license to toss aside the privacy and security concerns that motivated Congress and the Judicial Conference. Judge Reinhardt rightly opined that the "panel should be embarrassed to make this argument. Either the rule is designed to protect the identity of minors or it is not. The answer is clearly the former, although where it may not fully serve that purpose Doe status remains available." App. 88a.

Quoting Rule 5.2(a)'s opening clause—"Unless the court orders otherwise"—the panel also held that "nothing in the rule *mandates* veiled identity for minors." App. 92a; *accord id.* ("The statute [sic] gives the district judge discretionary power to permit the use of a minor's initials; it does not mandate a particular result."). The panel is right in one respect: Rule 5.2(a) does not eliminate the exercise of discretion by trial judges. That is why petitioners did not argue that the rule *alone* compelled the district court to grant their motion to employ pseudonyms, and why they do not argue here that the rule *alone* compels reversal.

Instead—and this brings us to the nub of the issue—the significance of Rule 5.2(a) is to overcome what the panel repeatedly found to be the "presumption against anonymity." App. 98a; *see also* App. 11a ("The normal presumption in litigation is that parties must use their real names."); App. 13a (postulating "the strong general presumption that plaintiffs will conduct litigation under their own names"). One need not question this presumption in the typical federal case filed by an adult plaintiff

to perceive that it cannot be reconciled with Rule 5.2(a) in the atypical case filed by a minor plaintiff. Unless it is to be said that the collective efforts of Congress, the Judicial Conference, and this Court have yielded nothing more than a time-wasting inconvenience for filers, then Rule 5.2(a) must be said to express the considered judgment that *minors* will *not* normally or generally be forced to use their true names in federal litigation.

In reaching the opposite conclusion, the Ninth Circuit panel departed from sound judicial practice. The same is true for the panel's treating the abstraction of open courts as a "paramount" consideration against permitting pseudonyms.

II. Compelling Factual Circumstances Warrant Plenary Review or Summary Reversal.

The opportunity to correct an erroneous interpretation of a rule of procedure mandated by Congress and approved by this Court, along with the opportunity to sanction the long-standing practice of federal courts to acquiesce in the use of pseudonyms, provide more than sufficient traditional justification for the Court to exercise certiorari jurisdiction in this case.

Even so, petitioners would be less than candid if they did not admit that their petition also has a fact-specific quality that necessarily distinguishes it from a classic conflict-among-the-circuits petition. But in truth, any petition that implicates the "so far departed" clause of this Court's Rule 10(a) shares that quality. Last Term's *Hollingsworth v. Perry*, wherein the Court invoked that clause in granting an application "to stay the broadcast of a [single] federal trial," 130 S. Ct. at 706, is a recent example. Earlier and in a more traditional vehicle was

the Court's reliance on that clause in granting certiorari in *Khanh Phuong Nguyen v. United States*. The Court took that case to decide whether a Ninth Circuit panel "consisting of two Article III judges and one Article IV judge had the authority to decide petitioners' appeals." 539 U.S. at 71. The Court acknowledged that "the improper composition of the court below was an isolated, one-time mistake," *id.* at 81 n.12, but the Court nevertheless "granted the writ to determine whether the Court of Appeals had 'so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power,'" *id.* at 73-74 (citation omitted; quoting Rule 10(a)).

Here, compelling factual circumstances warrant review. Once the Ninth Circuit's erroneous "presumption against anonymity" as well as its unjustified elevation of "open courts" are rightly set aside, there is literally *no credible basis* for denying petitioners the use of pseudonyms in this case. Apart from open courts, all of the public interest considerations identified by the court of appeals favored *petitioners*. *See supra* p. 9. As for the supposed prejudice to respondents, the panel itself explained in some detail why it was "doubt[ful] that anonymity would hinder [respondents'] standing defense." App. 18a n.7. Moreover, although the panel held that "the district court did not abuse its discretion by finding that [respondents] would have been hindered in their efforts to "defend[this] high-profile case in the media," *id.*, no judge below actually made such a finding. *See* App. 31a-36a (district judge listed "prejudice to the opposing party" as one relevant factor but did not further discuss prejudice); App. 59a (magistrate judge held that respondents "will *not* be prejudiced by [petitioners'] portrayal in the media" (emphasis added)).

On petitioners' side, by contrast, are the "undoubtedly severe" threats of physical retaliation, App. 14a—highlighted by the telephone call to petitioners' counsel warning him that "everyone is going to know who your clients are," such that "both you and your haole clients can get the lickins' you deserve," App. 8; *see also supra* pp. 5-8 (documenting additional threats). Chief Judge Kozinski was precisely on the mark to observe that "[i]f threats like that were made against me or my family, I'd be worried," and "I'd call the U.S. Marshals." App. 67a. In a word, Judge Kozinski recognized that petitioners' fears of physical retaliation were "reasonable." Even the three-judge panel conceded that "there are several facts militating in favor of a finding that the Doe children's fears are reasonable." App. 15a. In nonetheless ruling that "[t]he district court did not abuse its discretion" in finding otherwise, App. 14a, the panel sanctioned a grave departure from sound judicial practice, not to mention common sense.

Finally, and stepping back from the facts, it is worth observing that the underlying legal issue that the decision below precluded from being considered—namely, whether respondents' racially exclusionary admissions policy comports with federal law—is important in its own right. As Chief Judge Kozinski rightly noted, the "difficult legal issue that lies at the heart of this dispute was resolved in [respondents'] favor in our en banc court by the narrowest of margins." App. 69a (citing *Doe I*, 470 F.3d at 829). That "issue will remain unsettled until the Supreme Court has had an opportunity to address it." *Id.* But *no court* is likely to have an opportunity to address the legality of respondents' racially exclusionary admissions policy if the children who would challenge that policy are forced to run the gauntlet of public harassment and retaliation entailed by the decision below.

One way or another, review is warranted. If plenary review is deemed unnecessary, summary reversal of the Ninth Circuit is a reasonable and ready alternative.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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March 2011

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOB DOE, a minor, by parents and next friends, James and Joyce Doe; JANET DOE, a minor, by parents and next friends, James and Joyce Doe; KARL DOE, a minor, by parents and next friends, Kirk and Kate Doe; LISA DOE, a minor, by mother and next friend, Laura Doe,
Plaintiffs-Appellants,

v.

KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE; NAINOA THOMPSON, in his capacity as Trustee; DIANE J. PLOTTS, in her capacity as Trustee; CORBETT A.K. KALAMA, in his capacity as Trustee; ROBERT K.U. KIHUNE, in his capacity as Trustee; J. DOUGLAS ING, in his capacity as Trustee,
Defendants-Appellees.

No. 09-15448

D.C. No. 1:08-cv-00359-JMS-BMK

OPINION

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, District Judge, Presiding

Argued and Submitted
October 13, 2009—Honolulu, Hawaii

Filed March 2, 2010

Before: Robert R. Beezer, Susan P. Graber and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Beezer

COUNSEL

Eric Grant, Sacramento, California, for the plaintiffs-appellants.

Kathleen M. Sullivan, Quinn Emanuel Urquhart Oliver & Hedges LLP, New York, New York, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

Few tenets of the United States justice system rank above the conflicting principles presented in this case: the transparency and openness of this nation's court proceedings and the ability of private individuals to seek redress in the courts without fear for their safety. The plaintiffs, four minor children ("the Doe children"), seek to proceed anonymously in their suit against Kamehameha Schools' allegedly race-based admissions policy. The plaintiffs' parents fear for the children's safety if their identities are revealed. After carefully considering the issue, the magistrate judge and district judge decided that the prejudice to the defendants and the public's interest in open courts outweigh plaintiffs' fears of

harm. Rather than disclose their names, the Doe children suffered dismissal with prejudice with leave to appeal, giving us jurisdiction under 28 U.S.C. § 1291. We affirm.

I

The Hawaiian monarchy was overthrown in 1893, and Hawaii was annexed as a territory of the United States in 1897. *Doe v. Kamehameha Sch. / Bernice Pauahi Bishop Estate* (*Doe I*), 470 F.3d 827, 831 (9th Cir. 2006) (en banc). By that time, U.S. and foreign settlement had brought economic distress, mortality and disease; the Native Hawaiian population had dwindled to 22,600 in 1919, from a population 10 to 50 times larger a century and a half earlier. *See id.* at 830.

It was in this context that in 1884, Princess Bernice Pauahi Bishop, the last descendant of the Hawaiian monarchy, established two schools and a testamentary trust to fund them. *See* Leigh Caroline Case, Note, *Hawaiian Eth(n)ics: Race and Religion in Kamehameha Schools*, 1 Wm. & Mary Bill Rts. J. 131, 131 (1992). The Kamehameha Schools have sought to preserve the Hawaiian culture and identity by providing classes on Hawaiian culture and teaching classes in the Hawaiian language. The teaching and use of the Hawaiian language were banned in public schools from 1896 to 1986. U.S. Dep't of Justice & U.S. Dep't of Interior, *From Mauka to Makai: The River of Justice Must Flow Freely* 29 (2000).

The schools have since expanded to three K-12 campuses, and the trust totaled $ 9.1 billion in 2008—a private educational endowment surpassed in the United States by very few universities. *See* Rick Daysog, *Kamehameha Assets Approach $9.1 Billion*, Honolulu Adver-

tiser, Feb. 9, 2008; Donald A. Thompson, Note, Brown v. Kamehameha Schools: *An Instrumental Critique of Remedial Self-Segregation in Private Education*, 81 S. Cal. L. Rev. 831, 833-34 (2008). But the board of trustees has interpreted the trust instrument to require the admission of Native Hawaiians to the near exclusion of applicants of other racial backgrounds. *Doe I*, 470 F.3d at 832. The Schools' publicly acknowledged policy is to grant admission to any applicant with any amount of Native Hawaiian blood before admitting other applicants. *Id.* Indeed, since 1966, only two non-Native Hawaiians have been admitted. David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. Haw. L. Rev. 319, 331 (2008).[1]

The schools voluntarily admitted one non-Native applicant, Kalani Rosell, in 2002, after determining that all qualified Native Hawaiian applicants had been admitted. *See id.*; Thompson, *supra*, at 833. The ensuing protests prompted Kamehameha to amend its admissions policy. Thompson, *supra*, at 833. Kamehameha waived the application fee and the minimum-test-score requirement, effectively ensuring that there would never again be an insufficient number of qualified Native-Hawaiian applicants. *Id.*

Another non-Native Hawaiian was admitted in 2003. Kamehameha Schools admitted Brayden Mohica-Cummings, who applied as a Native Hawaiian because his mother was adopted by a Native Hawaiian. Forman, *supra*, at 332. After determining that Mohica-Cummings

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[1] In the 1960s, Kamehameha Schools reversed its previous policy of allowing children of faculty members to attend the schools. *Doe I*, 470 F.3d at 870 (Bybee, J., dissenting).

was not of Native Hawaiian ancestry, Kamehameha rescinded his admission. *Id.* Mohica-Cummings sued for an injunction admitting him to the Schools. *Id.* The District of Hawaii granted a temporary injunction admitting the boy, and he was eventually allowed to matriculate as part of the settlement with Kamehameha. *Id.*

In 2003, a non-Native applicant to Kamehameha, challenged the Schools' admissions policy under 42 U.S.C. § 1981. *See Doe I*, 470 F.3d at 829. The district court upheld the admissions policy. *Id.* A panel of this Court reversed, but the en banc court reversed again, concluding that the admissions policy was a valid affirmative action plan. *See id.* The suit settled while the petition for certiorari was pending before the Supreme Court. Thompson, *supra*, at 835. The next day, the attorney in *Doe I* announced his intention to bring this suit in order to seek Supreme Court review of the Ninth Circuit's en banc decision. *See id.*

This case, however, quickly became mired in procedural conflict. In *Doe I*, Kamehameha never objected to the fact that the plaintiff proceeded anonymously, but the school objected to the Doe children's request for anonymity in this case. The Doe children moved for leave to proceed anonymously.[2]

In their motion, the Doe children argued that they reasonably fear physical injury if their identities are revealed. First, the Doe children pointed to public reactions to the District of Hawaii's injunction provisionally admitting Mohica-Cummings to Kamehameha. After

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[2] Plaintiffs' names were told to Kamehameha's counsel and some staff under a protective order.

the district court's order, the U.S. Attorney for Hawaii noted a "growing sense of anger and rage" and threats of "kill haole day everyday," prompting him to warn the public that violence or threats of violence based on race are federal offenses.[3]

Second, the plaintiffs referred to an affidavit executed by the *Doe I* plaintiff's mother. She recounted that after the amount of the *Doe I* settlement was leaked to the Honolulu press, there were calls to "break [the plaintiff's and his attorney's] every bone and make [those] bastards suffer." Others stated that "now the boy will have to pay" because they knew people "who want to kick this boys [sic] ****." Still others urged that the identities of the *Doe I* plaintiff and his mother be exposed to force them "to stand up and face those that they are robbing." She stated that because of these threats, she and her son would "fear for [their] safety if [their] identities [were] made public" and that they were "prepared to move and go into hiding" if their identities were revealed.

Third, the Doe children referred to various internet postings regarding their lawsuit. One posting predicted that if the plaintiffs were admitted to Kamehameha, they were "jus gonna get lickins everyday." Another posting warned that if plaintiffs' "haole attorneys con-

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[3] "Haole" is a term in the Native Hawaiian language denoting a foreigner, especially a White or Caucasian person. *Webster's Third New International Dictionary of the English Language, Unabridged* 1030 (1981). "Kill haole day" is an unofficial tradition in Hawaiian public schools when some Native Hawaiian children "beat[ ] up Caucasian students on the last day of school." Craig Gima, 'Kill Haole Day' Linked to Hate-Crime Bill, Honolulu Star Bulletin, Mar. 24, 1999.

tinue doing this, one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians armed with baseball bats or guns."

Finally, the plaintiffs called the court's attention to violent crimes with racial overtones committed by Native Hawaiians against non-Natives. In some of these crimes, young children severely injured their non-Native classmates, calling the victims derogatory names related to their skin color, especially "f------ haole."

Magistrate Judge Kurren found that the threats against plaintiffs in previous lawsuits and the attorneys were not directed toward the Doe children. The magistrate judge also found that other internet "comments [were] not threats but [did] voice the commentators' frustration with this lawsuit." Likewise, the magistrate judge discounted the anonymous internet comments suggesting that the Doe children would be injured at Kamehameha Schools, relying on the plaintiffs' statement that they "are fearful of *public* harassment and retaliation, as reflected in *public* threats and other vitriol, *not* with possible retaliation and ostracism at KS if and when they are admitted." Although the plaintiffs' parents' affidavits showed "subjective fear" of retaliation, the court found that, "[a]t most, Plaintiffs' evidence suggests they may be socially ostracized." The magistrate judge denied the motion to proceed anonymously.

Later that afternoon, two Hawaiian newspapers published stories reporting on the magistrate judge's order. The online forums of each newspaper generated myriad comments. The Doe children moved to reconsider based on this newly discovered evidence, highlighting comments such as, "Good that the judge ordered them to make these little brats [sic] names known to the public,

so they can be tormented by their fellow students and general public." Another posting stated that these "4 kids . . . will need 10 bodyguards lol." Another read, "Sacrifice them!!!!!!!!," and another: "And I'd say the majority of 'us' don't want anything bad to happen to the kids. We all realize that they are mere pawns in this mess caused by 'adults.' Now stringing up those scum lawyers is not such a bad idea. (Don't be scared, it's in the Halloween spirit)." Another predicted that if their names were revealed, the plaintiffs "would have to watch their backs for the rest of their lives!"

Plaintiffs also introduced threatening comments made to their attorney, David Rosen. Rosen received a phone call on the afternoon the magistrate judge's decision was filed. The caller warned that "everyone is going to know who your clients are. Now, both you and your haole clients can get the lickins' you deserve. Why do you f------haoles even come to Hawaii?" He also received an email:

> You are a son of a bitch . . . I know so many kids that did not get into kamehameha schools with Hawaiian blood and you are trying to take that away . . . I am tired of haoles like you. yOU JEWISH [**10] SHITHEAD!!!! if i see you ever in public..no worries . . . I will SPIT on you . . . and YOU will throw the first punch . . . and believe me . . . it will be my pleasure to beat the crap out of you . . . by the way . . . i am a NON Hawaiian . . . .

The magistrate judge found the additional comments "no more probative of a threat of harm to Plaintiffs than evidence this Court previously considered" and denied the motion to reconsider.

On review, the district court concluded that the motion to proceed anonymously was a nondispositive matter under Federal Rule of Civil Procedure 72(a) and upheld the magistrate judge's findings as neither clearly erroneous nor contrary to law. The district court determined that the Doe children had committed two fatal procedural flaws in their briefing.[4] In the alternative,

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[4] The district court ruled against the Doe children's motion to proceed anonymously on two procedural grounds, which we reject. The district court correctly determined that the Doe children's motion was nondispositive under Federal Rule of Civil Procedure 72(a) and Local Rule 74.1 and that the standard of review was whether the magistrate judge's findings were "clearly erroneous or contrary to law." *See* 28 U.S.C. § 636(b)(1)(A); *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 747-48 (9th Cir. 1990). Nonetheless, the Doe children's failure to argue under the correct standard of review did not constitute procedural default.

Second, the district court affirmed the magistrate judge's report on the ground that the Doe children offered no arguments for reversal but just incorporated by reference arguments made before the magistrate judge. Plaintiffs argue that Local Rule 74.1 requires only that the "appealing party [file and serve] a written statement of appeal [on the district court] which shall specifically designate the order, or part thereof, appealed from." Kamehameha Schools argues that Federal Rule of Civil Procedure 10(c) does not allow a party to incorporate earlier briefing by reference. *See Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996). Yet the Doe children justify their incorporation by reference under Local Rule 74.1, not Federal Rule 10(c). Rule 74.1 must be interpreted in light of Local Rule 74.2, which requires a party appealing a magistrate judge's case dispositive order to file "written objections that specifically identify the portions of the order, findings, or recommendations to which objection

(continued...)

the district judge ruled against the Doe children on the merit . The court found that the Doe children only appealed two of the relevant *factors*—whether the threatened harm is sufficiently severe and whether reasonable persons in the plaintiffs' position would believe that they might actually be harmed.[5] The court concluded that, "[g]iven the absence of threats directed to Plaintiffs, no reasonable person in *any* position would believe a threat would be carried out."

II

We review the district court's denial of plaintiffs' motion for leave to proceed anonymously for an abuse of discretion. *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir. 2000). We must affirm the district court unless the district court "relied on an erroneous view of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors." *Id.*

III

To determine whether to allow a party to proceed anonymously when the opposing party has objected, a district court must balance five factors: "(1) the severity

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[4] (...continued)
is made and the basis for such objections." The absence of such specific requirements in Rule 74.1 is telling. Therefore, the Doe children did not default by merely appealing the magistrate judge's order and incorporating the arguments fully briefed before the magistrate judge.

[5] Given that we hold that the Doe children did not procedurally default, we also hold that they properly appealed consideration of all the factors relevant to a motion to proceed anonymously.

of the threatened harm, (2) the reasonableness of the anonymous party's fears, . . . (3) the anonymous party's vulnerability to such retaliation," (4) the prejudice to the opposing party, and (5) the public interest. *Id.* at 1068 (internal citations omitted).

The *Advanced Textile* analysis here is quite difficult, particularly in light of the controversy surrounding the case, the recognized tension between some Native Hawaiians and non-Natives in Hawaii and the threats against the anonymous plaintiffs. Still, the district court did not abuse its discretion in refusing to allow anonymity because the district court did not clearly err in its conclusion that the Doe children do not reasonably fear severe harm. Thus, the district court did not unreasonably conclude that the public interest and possible prejudice to the defendants outweigh the plaintiffs' interest in anonymity.

A

The *Advanced Textile* factor concerning the public interest sets the stage for our debate, so it is where we begin. The normal presumption in litigation is that parties must use their real names. *See id.* at 1067-68; Fed. R. Civ. P. 10(a). This presumption is loosely related to the public's right to open courts, *see Advanced Textile*, 214 F.3d at 1067, and the right of private individuals to confront their accusers, *see S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

In this circuit, the common law rights of access to the courts and judicial records are not taken lightly. We recognize that there is a "general right to inspect and copy public records and documents, including judicial records and documents." *Kamakana v. City of Honolulu*,

447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks and citations omitted). The "public interest in understanding the judicial process" has supported our "general history of access." *Id.* at 1178-79 (internal quotation marks omitted).

But, on the other side of the public-interest debate, it is difficult to see "how disguising plaintiffs' identities will obstruct public scrutiny of the important issues in this case." *Advanced Textile*, 214 F.3d at 1072. The Doe children bring claims of widespread discrimination. Neither the district court, the Ninth Circuit panel nor the en banc court in *Doe I* placed any reliance on the plaintiff's identity. There is no reason to believe these issues will play a greater role here.

The district court concluded that the public scrutiny of the Doe children's standing would be impaired by anonymity. Defendants proclaim that "the standing issue is of critical (in fact, *constitutional*) significance to the litigation." Although standing is indeed of paramount importance to the plaintiffs' ability to sue, it is certainly not the main issue in the public's eye. And, with such a large applicant pool, the court will most likely be able to discuss most aspects of an individual's application without revealing the individual plaintiff's identity.

Similarly, we recognize that the fact that the "public . . . has an interest in seeing this case decided on the merits" weighs in favor of allowing anonymity. *Id.* at 1073. Indeed, the district court's finding that "this case presents extremely controversial and very important issues in Hawaii" weighs in favor of allowing the Doe children to proceed anonymously. *See id.* at 1072. Because the case was dismissed for failure to include the plaintiffs' names in the complaint, "permitting the plain-

tiffs to use pseudonyms [would] serve the public's interest in this lawsuit by enabling it to go forward." *Id.* at 1062, 1073.

The district court properly weighed the arguments under the public-interest factor both for and against anonymity. Given the strong general presumption that plaintiffs will conduct litigation under their own names, we cannot say that the district court abused its discretion by concluding that this factor favors defendants.

B

The important public-interest factors on both sides of the issue lay the foundation for our debate, but the outcome of this case comes down to the two most important factors—severity of the threatened harm and the reasonableness of the plaintiffs' fears. As the district court recognized, these two *Advanced Textile* factors are intricately related and should be addressed together. In order to proceed anonymously, a plaintiff must show both (1) a fear of severe harm, *and* (2) that the fear of severe harm is reasonable. The district court did not clearly err in concluding that the Doe children do not reasonably fear severe harm.

First, the district court must identify the harm that the plaintiffs fear. Here, the Doe children primarily fear physical harm if their identities are revealed. The Doe children point to threats that they were "jus gonna get lickins everyday" and that these "4 kids . . . will need 10 bodyguards lol." The children likewise point to the phone call to their attorney threatening that now "both you and your haole clients can get the lickins' you deserve." They also point to the vitriolic threats of "kill haole day everyday" after Mohica-Cummings was admitted to Kamehameha.

These threats of physical retaliation are undoubtedly severe. In *Advanced Textile*, we recognized that physical harm presents the paradigmatic case for allowing anonymity. In that case, the non-resident plaintiffs faced the severe threats of deportation, arrest, and imprisonment, such that they did "*not* need to prove that they face[d] a danger of physical injury." *Id.* at 1071.

But, as the district court recognized, fear of severe harm is irrelevant if the plaintiffs do not *reasonably* fear severe harm. The district court did not abuse its discretion in concluding that the Doe children's fears of severe harm are not reasonable. *Advanced Textile* instructs that "plaintiffs are not required to prove that the defendants intend to carry out the threatened retaliation. What is relevant is [whether] plaintiffs were threatened, and [whether] a reasonable person would believe that the threat might actually be carried out." *Id.*

To judge the reasonableness of the plaintiffs' fears, we must consider the surrounding context and other listeners' reactions to the threats. *Cf., e.g., Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1079-80 (9th Cir. 2002) (en banc) (taking into account the context of the "random acts of violence" of others); *United States v. Prochaska*, 222 F.2d 1, 2 (7th Cir. 1955) (finding in criminal speech case that "[w]ritten words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published").[6] In

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[6] These First Amendment cases discussing the concept of a "true threat" are helpful, but the analysis here is not identical. The First Amendment cases pose a higher bar to find-

(continued...)

context, a plaintiff might reasonably fear a veiled threat of violence. *See Doe v. Stegall*, 653 F.2d 180, 183 n.6 (5th Cir. 1981) (holding that the plaintiffs reasonably feared harm and could proceed pseudonymously where locals reacted to a lawsuit about school prayer at a meeting by saying things like "God is fixing to come back. He'll show them," "Christians must beat the evil out of these people," and "We have got to band together and whop this evil thing"). On the other hand, a court may disregard a comment, which is a threat on its face, because the context demonstrates frustration, a joke, or political commentary instead of a true intent to harm. *See Watts v. United States*, 394 U.S. 705, 706-07 (1969) (per curiam) (concluding that speech against military draft that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was protected political speech in part because listeners laughed). It is in the particular purview of the district court to view alleged threats in context and determine what the "reasonable" person in the plaintiffs' situation would fear.

Here, there are several facts militating in favor of a finding that the Doe children's fears are reasonable. In context, the threats on the internet become much more

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[6] (...continued)
ing a reasonable fear. In those cases, one party's fear of the threat must be weighed against the opposing party's First Amendment right to speak freely because the threatened party seeks to prevent the other party's speech (the alleged threats). *See, e.g., Planned Parenthood*, 290 F.3d at 1071-72 (noting that the definition of "threat" is strict in First Amendment cases because advocating violence is protected but threatening violence is not). In this case, no one is arguing that the courts should enjoin the internet posters or other speakers.

frightening. The context no doubt includes random acts of racial violence against non-Native Hawaiian children. This is amplified by calls for "kill haole day everyday," when a non-Native was recently admitted to Kamehameha.

And as for evaluating the effect on other listeners, the U.S. Attorney for Hawaii did not laugh or dismiss the calls for "kill haole day" as the listeners laughed at the "threat" against President Johnson in the *Watts* case. Instead, the U.S. Attorney issued a strongly worded warning, reminding the public that threats based on race are a federal felony. Likewise, many of the "listeners" responding to the internet postings took the comments very seriously. One internet poster accused the others of "just want[ing] to persecute these kids," and another poster responded that "the majority of 'us' don't want anything bad to happen to the kids," implying that others did wish the children harm.

Nonetheless, the district court did not abuse its discretion in concluding that the plaintiffs' fears were unreasonable. The magistrate judge correctly recognized that many times people say things anonymously on the internet that they would never say in another context and have no intention of carrying out. *See* Mark Plate, *Online Abuses Spur Policy Changes*, Honolulu Advertiser, Nov. 24, 2008 (message from Senior Vice President/Editor of *The Honolulu Advertiser*, noting the problems the newspaper had with internet postings on many stories: "Since we opened up the option . . . for readers to comment on every story, ... [u]nfortunately, we have seen a steady rise of hateful name-calling, innuendo and inane drivel, all of it anonymous"). The magistrate judge noted that plaintiffs had culled only a few comments out of hundreds of anonymous comments regarding this

case. And he recognized that many of the "threats" were accompanied by statements supporting non-violence. One poster the Doe children cite as making threatening comments later stated that "No one wants to see any of the kids hurt by this. The people I know would fight to the death to save these kids if anyone tries to harm them." The district court also correctly evaluated the Doe children's concession "that they are not fearful of 'retaliation and ostracism at [Kamehameha] if and when they are admitted'" in discounting the threats that the children would get "lickins" everyday at school. Likewise, Rosell and Mohica-Cummings both attended Kamehameha with no reported incidents—either at school or outside the school setting. Mohica-Cummings used his real name in litigation against Kamehameha, and his counsel specifically stated that the U.S. Attorney's warnings to the public were unnecessary. The district court did not abuse its discretion in determining that the plaintiffs' fears were unreasonable.

C

Because the district court did not abuse its discretion by determining that the public interest weighs against anonymity and that the Doe children do not reasonably fear severe harm, the remaining two factors do not tip the balance. The district court correctly concluded that the third factor, the vulnerability of plaintiffs, weighs in favor of anonymity. Although the "youth of these plaintiffs [is] a significant factor in the matrix of considerations arguing for anonymity," *Stegall*, 653 F.2d at 186, the district court concluded that the Doe children do not reasonably fear severe harm *despite* this vulnerability. Likewise, the district court did not abuse its discretion in determining that plaintiffs' fears do not outweigh possible prejudice to defendants—however

minimal that prejudice might be—in light of the district court's conclusion that these fears are unreasonable.[7]

We are sympathetic to the concerns of the Doe children and their parents, but we recognize the paramount importance of open courts. For this reason, the default presumption is that the plaintiffs will use their true names. We also emphasize that, as an appellate court,

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[7] The district court did not discuss this element because it found that the plaintiffs had not sufficiently objected to the magistrate judge's resolution of this factor. We conclude that the plaintiffs raised this argument before the district court, *see supra* notes 4-5, but hold that this factor does not sway our analysis.

The magistrate judge found that the defendants would be prejudiced if the Doe children were to proceed anonymously due to standing-related discovery. The magistrate judge found that obtaining records regarding the Doe children, such as applications, would be burdened by the limited number of employees allowed to know the plaintiffs' names. The Doe children counter that thousands of pages of discovery, including plaintiffs' application packages, have already been produced.

We doubt that anonymity would hinder the defendants' standing defense. The Doe children have revealed their names under a protective order, and the parties could refer in general terms to the Doe children's relevant characteristics, such as whether they completed their applications or met the school's requirements in terms of test scores and grades. Likewise, the Doe children's actual applications could be used simply by redacting the children's names and any particular identifying information. However, the district court did not abuse its discretion by finding that defendants would have been hindered in their efforts to gather third-party discovery concerning standing and in defending the high-profile case in the media, if not in the courts.

we are constrained by the applicable standard of review. Had the district court found that anonymity was appropriate, we likely would have concluded that the district court did not abuse its discretion. Or, were we permitted to make findings and weigh the factors anew, we might have held that anonymity here was appropriate. As it is, however, we review the district court's decision only for abuse of discretion. Because the district court did not abuse its discretion in determining that the Doe children do not reasonably fear severe harm, we affirm the district court's order dismissing the case based on plaintiffs' failure to disclose their identities.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JACOB DOE and JANET DOE, minors, by their parents and next friends, JAMES AND JOYCE DOE; KARL DOE, a minor, by his parents and next friends, KIRK and KATE DOE; and LISA DOE, a minor, by her mother and next friend, LAURA DOE,	)	CIVIL NO. 08-00359 JMS/BMK
Plaintiffs,	)	ORDER AFFIRMING MAGISTRATE JUDGE KURREN's ORDERS DENYING: (1) PLAINTIFFS' MOTION FOR LEAVE TO PROCEED ANONYMOUSLY; AND (2) PLAINTIFFS' MOTION FOR RECONSIDERATION THEREOF
vs.	)	
KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE; and NAINOA THOMPSON, DIANE J. PLOTTS, CORBETT A. K. KALAMA, ROBERT K. U. KIHUNE, and J. DOUGLAS ING, in their capacities as Trustees thereof,	)	
Defendants.	)	

ORDER AFFIRMING MAGISTRATE JUDGE KURREN'S ORDERS DENYING: (1) PLAINTIFFS' MOTION FOR LEAVE TO PROCEED ANONYMOUSLY; AND (2) PLAINTIFFS' MOTION FOR RECONSIDERATION THEREOF

I. INTRODUCTION

Currently before the court is "Plaintiffs' Statement of Appeal From or Objections to, Magistrate Judge's Orders Denying (1) Plaintiffs' Motion for Leave to Proceed Anonymously; and (2) Plaintiffs' Motion for Reconsideration Thereof" ("Plaintiffs' Appeal"). Based on the following, the court AFFIRMS Magistrate Judge Kurren's Orders Denying (1) Plaintiffs' Motion for Leave to Proceed Anonymously; and (2) Plaintiffs' Motion for Reconsideration Thereof.

II. BACKGROUND

Plaintiffs, minors who bring this action by their parents as next friends,[1] challenge the legality of policies and practices implemented by Defendants that grant a preference on the basis of "Hawaiian ancestry" for admission to campuses that are part of the Kamehameha Schools/Bernice Pauahi Bishop Estate ("KSBE"). Compl. ¶ 1. Plaintiffs brought this action anonymously based on a fear of retaliation. *See id.* ¶ 6. Plaintiffs therefore proposed, and Defendants[2] rejected, that the parties stipulate to Plaintiffs proceeding anonymously.

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[1] Plaintiffs are: (1) Jacob and Janet Doe, by their parents and next friends James and Joyce Doe; (2) Karl Doe, by his parents and next friends Kirk and Kate Doe; and (3) Lisa Doe, by her mother and next friend, Laura Doe.

[2] Defendants are KSBE and KSBE Trustees Nainoa Thompson, Diane J. Plotts, Corbett A.K. Kalama, Robert K.U. Kihune, and J. Douglas Ing.

On August 29, 2008, Plaintiffs filed their Motion for Leave to Proceed Anonymously ("Plaintiffs' Motion to Proceed Anonymously"), and the parties subsequently stipulated to an interim protective order in which Plaintiffs agreed to disclose their identities to one of Defendants' counsel who may then disclose that information to five additional attorneys and one non-attorney employee of KSBE who is involved in the admissions screening process. Doc. No. 30. Defendants filed their Opposition to Plaintiff's Motion to Proceed Anonymously on October 7, 2008, and a sealed Supplemental Memorandum on October 8, 2008. Plaintiffs filed their Reply on October 13, 2008, and a sealed Supplemental Reply on October 16, 2008.

On October 28, 2008 and after hearing oral argument, Magistrate Judge Kurren denied Plaintiffs' Motion to Proceed Anonymously (the "October 28 Order"). Shortly thereafter, the parties sought amendment to the October 28 Order because it stayed disclosure of Plaintiffs' identities for 10 days from the date of the October 28 Order, while the interim protective order contemplated that Plaintiffs would have 15 days from the final resolution, including appeals, of any court order requiring disclosure of any of Plaintiffs' identities. At the request of the parties and pursuant to the parties' stipulation and agreement, Magistrate Judge Kurren amended the October 28 Order to include the following language:

> Plaintiffs shall have fifteen (15) days from the date of this order or, if appeal(s) is/are timely taken, the date of the final appellate decision adverse to Plaintiffs' position with respect to anonymity, to file an amended Complaint disclosing their identities. If any one or more of the Plaintiffs decline to agree to disclose their iden-

> tities within [15 days from the date or this order or any final appellate decision adverse to Plaintiffs], their claims in this action will be dismissed with prejudice and the Plaintiff(s) who refuse(s) to allow disclosure shall be enjoined forever from anonymously filing or pursuing another action seeking the same or similar relief against Defendants.

Doc. No. 48.

On November 12, 2008, Plaintiffs filed a Motion for Reconsideration of the October 28 Order. On November 24, 2008, Defendants filed their Opposition, and Plaintiffs filed their Reply on December 2, 2008. On December 31, 2008, Magistrate Judge Kurren denied Plaintiffs' Motion for Reconsideration.

Plaintiffs' Appeal of the October 28 Order and December 31 Order (collectively the "October 28 and December 31 Orders") followed on January 9, 2009. Defendants filed their Response to the Appeal on January 20, 2009, Plaintiffs filed a Reply on January 27, 2009, and Defendants filed a Surreply on February 3, 2009.[3]

III. DISCUSSION

A. Proper Standard of Review for Plaintiffs' Appeal

Before turning to the merits of Plaintiffs' Appeal, the court addresses the threshold issue of the proper standard of review for the October 28 and December 31 Orders. Plaintiffs argue that the standard of review is de novo, while Defendants argue that the court should apply the "clearly erroneous or contrary to law" standard of review.

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[3] Pursuant to Local Rule ("L.R.") 7.2(d), the court determines Plaintiffs' Appeal without a hearing.

A district court may designate a magistrate judge to determine any pretrial matter except for certain dispositive motions. 28 U.S.C. § 636(b)(1)(A).[4] A party may appeal a magistrate judge's determination of a pretrial nondispositive matter to the district court, *see id.*; Fed. R. Civ. P. 72(a) (allowing the court to refer nondispositive matters to the magistrate judge); L.R. 74.1, and the district court may modify or set aside any portion of the magistrate judge's order found to be "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a); L.R. 74.1. As defined by Federal Rule of Civil Procedure 72(a), a nondispositive matter is "a pretrial matter not dispositive of a party's claim or defense."

Correspondingly, 28 U.S.C. § 636(b)(1)(B) authorizes a district court to designate a magistrate judge to hear those dispositive motions excluded from 28 U.S.C. § 636(b)(1)(A) and submit proposed findings of fact and recommendations, which are then subject to de novo review. 28 U.S.C. § 636(b)(1)(B); *see also* L.R. 74.2. Federal Rule of Civil Procedure 72(b) similarly provides

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[4] Specifically, 28 U.S.C. § 636(b)(1)(A) provides:

> [A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

that a district judge may assign a magistrate judge to hear dispositive motions which will then be subject to de novo review, but does not identify what constitutes a dispositive motion as does 28 U.S.C. § 636(b)(1)(A).

The court does not merely determine whether Plaintiffs' Motion to Proceed Anonymously is one of those listed in 28 U.S.C. § 636(b)(1)(A), but instead must analyze whether the motion is "characterized as dispositive or non-dispositive of a claim or defense of a party." *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 747 (9th Cir. 1990) (applying this analysis to determine that a motion for Rule 11 sanctions is a nondispositive motion); *Boskoff v. Yano*, 217 F. Supp. 2d 1077, 1083 (D. Haw. 2001) ("The applicable standard of review for an appeal of a magistrate's order turns on whether the order is dispositive or nondispositive." (citations omitted)). Any motion neither listed nor analogous to one listed in 28 U.S.C. § 636(b)(1)(A) "falls within the non-dispositive group of matters which a magistrate may determine." *Maisonville*, 902 F.2d at 748.

Because Plaintiffs' Motion to Proceed Anonymously is not one of the named exceptions in 28 U.S.C. § 636(b)(1)(A), the court must determine whether it can be characterized as dispositive of a claim or defense of a party. The court concludes that the only fair reading of Plaintiffs' Motion to Proceed Anonymously and the resulting October 28 and December 31 Orders is that they address a nondispositive matter.

Specifically, the October 28 and December 31 Orders were "not dispositive of any claim or defense of a party." *See* Fed. R. Civ. P. 72(a). The October 28 and December 31 Orders did not decide any claim of the parties, but rather merely determined that Plaintiffs could

not proceed in this action anonymously. Indeed, other courts have reviewed magistrate judge rulings on whether a plaintiff may proceed anonymously for clear error. *See Fernandez v. Nevada*, 2008 WL 852594, at *1 (D. Nev. Mar. 7, 2008) (reviewing magistrate judge's order denying plaintiff's application for leave to proceed using a pseudonym for clear error); *Hodge v. United States*, 2007 WL 4082037, at *1 (M.D. Pa. Nov. 15, 2007) (same); *Doe v. Hartford Life & Acc. Ins. Co.*, 237 F.R.D. 545, 547 (D. N.J. 2006) (same).

Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068-69 (9th Cir. 2000), lends support to the court's conclusion that the October 28 and December 31 Orders determined a nondispositive matter only. In reviewing a district court order dismissing a complaint with leave to amend due to the plaintiffs' failure to disclose their identities, *Advanced Textile* described the district court order as a "discretionary" "case management decision" that *Advanced Textile* could reverse only "if the district court relied on an erroneous view of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors."[5] *Id.* at 1069.

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[5] Plaintiffs argue that *Advanced Textile* actually supports that the October 28 and December 31 Orders were dispositive because *Advanced Textile* found that the district court ruling was sufficiently final to confer appellate jurisdiction on the Ninth Circuit. *See* Pls.' Appeal 4-5. Plaintiffs confuse finality sufficient to support an appeal through the collateral order doctrine with whether such an order addresses a dispositive matter. The collateral order doctrine is a wholly separate inquiry from whether an order is dispositive or nondispositive. *See United States v. Rivera-Guerrero*, 377

(continued...)

In support of a de novo review, Plaintiffs argue that the October 28 and December 31 Orders were dispositive because they are the equivalent of an involuntary dismissal. Pls.' Appeal 5. Specifically, Plaintiffs point to the Stipulated Order Modifying the October 28 Order, which provides:

> Plaintiffs shall have fifteen (15) days from the date of this order or, if appeal(s) is/are timely taken, the date of the final appellate decision adverse to Plaintiffs' position with respect to anonymity, to file an amended Complaint disclosing their identities. If any one or more of the Plaintiffs decline to agree to disclose their identities within [15 days from the date or this order or any final appellate decision adverse to Plaintiffs], their claims in this action will be dismissed with prejudice and the Plaintiff(s) who refuse(s) to allow disclosure shall be enjoined forever from anonymously filing or pursuing another action seeking the same or similar relief against Defendants.

Doc. No. 48. Plaintiffs' argument is unpersuasive.

This language is not akin to an involuntary dismissal. Instead, it explicitly gives Plaintiffs the option to either disclose their identities and proceed with this action, or decline disclosure and have this action ulti-

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[5] (...continued)
F.3d 1064, 1068 (9th Cir. 2004) (stating that "final" for purposes of the collateral order doctrine provides a "very different context[]" than "final" for purposes of whether an order is dispositive). As described above, *Advanced Textile* explains that the district court addressed a "case management decision," not a dispositive matter.

mately dismissed. Indeed, Plaintiffs and Defendants explicitly stipulated and agreed to this language when they asked Magistrate Judge Kurren to include this paragraph in an amended order. The October 28 Order originally provided that due to its denial of Plaintiffs' Motion to Proceed Anonymously, "disclosure of Plaintiffs' identities is stayed for ten days from the date this order is filed." Doc. No. 45. The parties sought amendment of this language because the 10-day stay of disclosure appeared to conflict with language Plaintiffs had submitted in the parties' stipulated interim protective order, which contemplated that Plaintiffs would have 15 days from the final resolution, including appeals, of any court order requiring disclosure of any of Plaintiffs' identities. *See* Defs.' Surreply Ex. A (showing Plaintiffs' edits to protective order). Plaintiffs drafted the proposed amendment to the October 28 Order, which Magistrate Judge Kurren signed. Doc. No. 48 (listing Plaintiffs' counsel on the header of the order); *see also* L.R. 10.2(b) (requiring counsel identification on the first page of each paper presented for filing). This language in the amended October 28 Order can hardly be viewed as working an involuntary dismissal where Plaintiffs: (1) proposed this language for the interim protective order, *see* Defs.' Surreply Ex. A; (2) expressly "stipulated and agreed" to it again in seeking amendment to the October 28 Order, and (3) submitted the Stipulated Order Modifying the October 28 Order for Magistrate Judge Kurren's signature.

Further, even taking this language at face value, it does not suggest that Plaintiffs' claims will be automatically dismissed should they fail to disclose their identities. While the language of the October 28 Order is silent on steps for dismissal, the most reasonable inter-

pretation is that Defendants, once the 15-day time period expires, would bring a motion seeking involuntary dismissal due to Plaintiffs' failure to disclose their identities. Such motion—if heard by Magistrate Judge Kurren—would be subject to de novo review. *See* 28 U.S.C. § 636(b)(1)(A) (listing a motion for involuntary dismissal as an exception subject to de novo review); Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision . . . operates as an adjudication on the merits.").

This *possibility* of future dismissal, however, does not convert Plaintiffs' Motion to Proceed Anonymously from precisely what it is—a nondispositive motion addressing pretrial issues committed to the sound discretion of Magistrate Judge Kurren.[6] *See, e.g., Pigott v. Sanibel Dev.*,

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[6] The court is aware that *Rivera-Guerrero* states that the court must "look to the effect of the motion, in order to determine whether it is properly characterized as 'dispositive or non-dispositive of a claim or defense of a party.'" *Rivera-Guerrero*, 377 F.3d at 1068 (quoting *Maisonville v. F2 Am.*, Inc., 902 F.2d 746, 747 (9th Cir. 1990) (emphasis added)). *Rivera-Guerrero*, however, addressed very different facts and it therefore easily distinguishable. Specifically, *Rivera-Guerrero* addressed whether the district court could delegate to the magistrate judge a motion seeking authorization for involuntary administration of medication to a criminal defendant so that he could stand trial. *Id.* at 1069. Finding this a dispositive matter, *Rivera-Guerrero* relied on the fact that the order would have "direct consequences on Rivera's defense that he is not competent to stand trial," and was "dispositive of [defendant's] affirmative claim that he has a

(continued...)

LLC, 2008 WL 2937804, at *4 (S.D. Ala. July 23, 2008) ("[C]ase law is abundant for the common-sense proposition that a magistrate judge ruling on a nondispositive matter does not somehow mutate into a ruling on a dispositive matter simply because that ruling ultimately affects the outcome of a claim or defense."); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 2004 WL 2550309, at *2 (D. N.J. Oct. 1, 2004) ("[E]ven if a magistrate judge's order has the potential to materially affect the outcome of an issue, the order should still be reviewed under the more deferential standard."). If the rule were otherwise, "nondispositive magistrate judge rulings would be vanishingly rare; after all, virtually every decision on discovery, scheduling, evidentiary and other matters has the potential to affect the ultimate outcome of a claim or defense."[7]

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[6] (...continued)
constitutional right to be free from unwanted medication." *Id.* The magistrate judge's order directly impacted the defendant's competency defense and raised an issue of "clear constitutional importance" such that "[a]llowing a magistrate judge to make the ultimate decision in a matter of such clear constitutional import would raise serious Article III concerns." *Id.* at 1070; *see also Wang v. Masaitis*, 416 F.3d 992, 1000 (9th Cir. 2005) (discussing *Rivera-Guerrero* and its focus on the constitutional implications of an order authorizing involuntary administration of medication). Plaintiffs' Motion to Proceed Anonymously raises neither constitutional concerns nor concerns regarding a criminal defendant's right to a fair trial.

[7] Plaintiffs' Motion to Proceed Anonymously and their subsequent threat that they may allow this action to be dismissed if they are not allowed to proceed anonymously is akin to almost any other basic discovery dispute. For example, if Magistrate Judge Kurren had ordered Plaintiffs to
(continued...)

Pigott, 2008 WL 2937804, at *4 n.7.

Accordingly, the court concludes that it must review the October 28 and December 31 Orders to determine whether they are clearly erroneous or contrary to law. The threshold of the "clearly erroneous" test is high and significantly deferential. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004); *Boskoff*, 217 F. Supp. 2d at 1083; *Thorp v. Kepoo*, 100 F. Supp. 2d 1258, 1260 (D. Haw. 2000).

B. Merits of Plaintiffs' Appeal

In denying Plaintiffs' request to proceed anonymously, the October 28 Order applied the factors articulated in *Advanced Textile*, including: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; (3) the anonymous party's vulnerability to such retaliation; (4) the prejudice to the opposing party; and (5) whether the public's interest in the case would be best served by requiring that the litigants reveal their identities. *See Advanced Textile Corp.*, 214 F.3d at 1068. Of these factors, the October 28 Order found that the only factor weighing in favor of anonymity was Plaintiffs' vulnerability to retaliation. Oct. 28 Order 13-14. The October 28 Order therefore concluded

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[7] (...continued)
produce discovery and Plaintiffs, rather than comply, chose to have the action dismissed, their subsequent choice would not convert Magistrate Judge Kurren's decision on a basic discovery dispute into a dispositive matter.

that Plaintiffs did not carry their burden in showing that balancing these factors weighed in favor of anonymity. *Id.* 19-21. On reconsideration, the December 31 Order considered new evidence generated as a result of the October 28 Order that Plaintiffs alleged shows threats of harm, and found that this new evidence was "no more probative of a severe threat of harm or a reasonable fear of harm" than the evidence already considered. Dec. 31 Order 7.

Plaintiffs appeal both these Orders, but, as explained below, their Appeal is wholly inadequate to carry their burden of showing that the October 28 and December 31 Orders are clearly erroneous or contrary to law.

1. Procedural Flaws

Plaintiffs commit two major procedural mistakes in their Appeal, either of which on their own provides ample basis for denying their Appeal.

First, Plaintiffs fail to proffer any argument under the correct standard of review—Plaintiffs' Appeal argues for de novo review and then includes a single section entitled "Plaintiffs should be permitted to proceed anonymously" in which it is unclear what standard they apply. While Plaintiffs present vague arguments regarding points of law the court should consider and purported errors in the October 28 and December 31 Orders on specific *Advanced Textile* factors, Plaintiffs never explain how their arguments, when taken into account with all the *Advanced Textile* factors, show that the October 28 and December 31 Orders were clearly erroneous or contrary to law in determining that Plaintiffs could not proceed anonymously. On this basis alone, Plaintiffs have not carried their burden because they have failed to present any arguments that address, much less

explain, how the evidence leaves one "with the definite and firm conviction that a mistake has been committed." *See U.S. Gypsum Co.*, 333 U.S. at 395.

Second, Plaintiffs' Appeal is also wholly lacking because rather than proffer specific arguments for reversal, Plaintiffs refer back to their previous submissions before Magistrate Judge Kurren in an apparent attempt to incorporate those arguments on Appeal. For the most part, Plaintiffs fail to identify which arguments from their previous submissions the court should consider and in any event, never provide any explanation why Magistrate Judge Kurren erred in rejecting these arguments in the first instance. *See, e.g.*, Pls.' Appeal 8 ("The last two [of Plaintiffs'] submissions show how Judge Kurren's original order erred in evaluating the evidence, especially the evidence of threats against Plaintiffs and their counsel [and] Judge Kurren's order on reconsideration declined to confront Plaintiffs' criticisms.").

Instead, Plaintiffs apparently expect the court to cull through their earlier submissions and determine which arguments might have value on appeal. Plaintiffs posit that Local Rule 74.2 allows them to incorporate their previous arguments because on de novo review, the court will "consider the record developed before the magistrate judge, making his or her own determination on the basis of that record." *See* Pls.' Appeal 7-8 (citing L.R. 74.2). The court is not applying a de novo standard of review, however, and even if Local Rule 74.2 did apply, it does not suggest that a party can incorporate its previous arguments by merely referring back to those submissions. *See* L.R. 74.2 (requiring that the party provide "written objections that specifically identify the portion of the order, findings, or recommendations to which objection is made and the basis for such objec-

tions"). The court should not be required to root around in the record to find arguments Plaintiffs did not bother to properly raise in their Appeal.[8] *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (stating that judges are not "like pigs, hunting for truffles [in the record]"). Such a scavenger hunt cannot carry Plaintiffs' burden on appeal.

2. Lack of Meritorious Arguments

Even viewing the specific arguments Plaintiffs make in their Appeal as arguing for clear error, the court finds no basis to reverse the October 28 and December 31 Orders. Plaintiffs appear to argue that Magistrate Judge Kurren improperly determined two *Advanced Textile* factors—the severity of the threatened harm and whether reasonable persons in Plaintiffs' position would believe that they may be harmed. Pls.' Appeal 8-9. The court finds that Magistrate Judge Kurren committed no error in his analysis of these two factors.

Regarding the severity of the threatened harm, *Advanced Textile* recognizes that the court should consider the threat of not only physical harm, but also economic and social harm. *Advanced Textile*, 214 F.3d at 1070-71. The October 28 Order considered all these types of harm in weighing the evidence presented. The October 28 Order went through each type of alleged threat in detail —including internet comments regarding articles about this lawsuit, newspaper articles regarding Defendants' forced admission of a non-Hawaiian student, and news-

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[8] The court did, however, independently review all of the parties' submissions regarding the October 28 and December 31 Orders and finds no clear error in any of Magistrate Judge Kurren's findings or conclusions.

paper articles regarding physical attacks on minors and adults based on race, sex and disability—and explained why the evidence did not indicate a threat of harm to Plaintiffs. When Plaintiffs came forward with additional evidence of public and private reactions to the October 28 Order, the December 31 Order again considered each piece of evidence and found that they do not "show an 'objectively reasonable fear of extraordinarily severe retaliation.'" Dec. 31 Order 9-10 (quoting *Advanced Textile*, 214 F.3d at 1063, 1069). Magistrate Judge Kurren's thorough analyses of the evidence are not clearly erroneous or contrary to law.[9]

Regarding the reasonableness of Plaintiffs' fears, Plaintiffs suggest that Magistrate Judge Kurren applied

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[9] Plaintiffs also suggest, without any real explanation, that Magistrate Judge Kurren applied a too-narrow definition of "threat" and ignored *Planned Parenthood of Columbia / Williamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). *See* Pls.' Appeal 8 (referring the court to its previous submissions). The court rejects this argument. *Planned Parenthood* addresses the definition of "threat" for purposes of a First Amendment claim and does not address the *Advanced Textile* factors. *See Planned Parenthood of Columbia / Williamette, Inc.*, 290 F.3d at 1071. As such, *Planned Parenthood* does not change *Advanced Textile's* specific holding that plaintiffs may conceal their identities where they "demonstrate that they have an objectively reasonable fear of extraordinarily severe retaliation." *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir. 2000). At most, *Planned Parenthood* explains that determining the existence of a threat depends on context, *see Planned Parenthood of Columbia / Williamette, Inc.*, 290 F.3d at 1071, which is precisely what Magistrate Judge Kurren considered in his analyses. *See, e.g.*, Oct. 28 Order 8-11; Dec. 31 Order 7-9.

the incorrect inquiry because he did not view the evidence from the position of a reasonable person in Plaintiffs' position, i.e., parents and children. Pls.' Appeal 8-9. The court disagrees that Magistrate Judge Kurren made any error. The October 28 Order explicitly considered the *Advanced Textile* framework that Plaintiffs "are not required to prove that the defendants intend to carry out the threatened retaliation. [] What is relevant is that plaintiffs were threatened, and that a reasonable person would believe that the threat might be actually be carried out." Oct. 28 Order 11 (quoting *Advanced Textile*, 214 F.3d at 1071). The October 28 Order found that Plaintiffs' fears of retaliation were not reasonable because the evidence did not establish any actual threats against Plaintiffs. Given the absence of threats directed to Plaintiffs, no reasonable person in any position would believe a threat would be carried out.

In sum, Plaintiffs have failed to raise any objections to the October 28 and December 31 Orders which show that they are clearly erroneous or contrary to law.

IV. CONCLUSION

Based on the above, the court AFFIRMS Magistrate Judge Kurren's Orders Denying: (1) Plaintiffs' Motion for Leave to Proceed Anonymously; and (2) Plaintiffs' Motion for Reconsideration Thereof.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 6, 2009.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

[SEAL]

Doe et al. v. Kamehameha Schs. et al., Civ. No. 08-00359 JMS/BMK: Order Affirming Magistrate Judge Kurren's Orders Denying: (1) Plaintiffs' Motion for Leave to Proceed Anonymously; and (2) Plaintiffs' Motion for Reconsideration Thereof

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JACOB DOE, et al.,	)	Civ. No. 08-00359 JMS-BMK
	)	
Plaintiffs,	)	ORDER DENYING
	)	PLAINTIFFS' MOTION
vs.	)	FOR RECONSIDERATION
	)	
KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

Before the Court is Plaintiffs' Motion For Reconsideration ("Motion") of this Court's October 28, 2008 Order Denying Plaintiffs' Motion for Leave To Proceed Anonymously and For Related Protective Order ("Order Denying Anonymity"). In the Order Denying Anonymity, this Court ruled that "Plaintiffs' need for anonymity does not outweigh prejudice to Defendants and the public's interest in this case" and ordered Plaintiffs to proceed openly. Plaintiffs now point to "public and private reactions" to the Order Denying Anonymity, which they argue "demonstrate convincingly that Plaintiffs' fear of harm if their identities are revealed to the public is reasonable." After careful consideration of the Motion and

the supporting and opposing memoranda, the Court finds that the additional anonymous comments offered by Plaintiffs are no more credible or probative than the ones already considered by the Court. Plaintiffs' Motion is DENIED.

FACTUAL BACKGROUND[1]

After the Order Denying Anonymity was filed, the local media covered the ruling on the front page of newspapers, in online articles, and over news broadcasts. The day the Order was filed, the Honolulu Advertiser and Honolulu Star Bulletin posted articles online about the ruling. (Exs. 3-5.) In response to those articles, readers posted hundreds of comments to the newspapers' websites. (Exs. 6-8; Exs. B-C.) Plaintiffs point to the following comments in particular and focus on the underscored language:

(1) Posted by a commentator named "former local boy":

> What a shocker this story is. *It's about time that someone put some pressure on these litigious people and their kids!* I am not of Hawaiian blood, but I was born and raised in Hawaii my whole life and have a lot of Hawaiian pride. I have always been in favor of what the Kamehameha School's has stood for and respect Bernice's will and intentions.
> I would have had more respect for those that want to sue this private school if they were willing to do it in an open manner so everyone knows who they are. *The words chicken s*** come to mind.*

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[1] Relevant facts underlying Plaintiffs' request for anonymity are discussed in the Order Denying Anonymity. In this section, the Court includes only those facts bearing relevance to the instant Motion.

(2) Posted by a commentator named "ahhh":

> It isn't our job to think about these kids. It's their parents job. And obviously they don't care about their kids, they care more about the money.
> And I'd say the majority of "us" don't want anything bad to happen to the kids. We all realize that they are mere pawns in this mess caused by "adults."
> *Now stringing up those scum lawyers is not such a bad idea.* (Don't be scared, it's in the Halloween spirit).

(3) Posted by a commentator named "Great Kid":

> *"Sacrifice them!!!!!!!!"*

(Exs. 6-8.)

The day after the Order Denying Anonymity was filed, Plaintiffs' counsel discovered that the internet comments posted on the Honolulu Advertiser's website were no longer accessible by the public. (Rosen Declaration ¶ 6.) After speaking to Honolulu Advertiser staff, he was informed that the comments "had been 'turned off' because the 'tone was no longer respectful or appropriate.'" (*Id.* ¶ 7.)

That same day, Plaintiffs' attorney received the following email:

> You are a son of a bitch...I know so many kids that did not get into kamehameha schools with Hawaiian blood and you are trying to take that away...I am tired of haoles like you. yOU JEWISH S***HEAD!!!! if i see you ever in public..no worries...i will SPIT on you...and YOU will throw the first punch...and believe me...it will be my pleasure to beat the crap out

> of you...by the way...i am NON Hawaiian...I and others are forming a team to have you disbarred...so watch your back...we have many attorneys that will be happy to charge you will [sic] bad practices...i hope this latest ruling will cramp your style...you jerk...i get so mad thinking what you're doing to the Trust.

(*Id.* ¶ 4; Ex. 1 (asterisks inserted).) The email is signed "Dan Akiyama" and states he is the president of Executive Business & Tax Solutions. (Ex. 1.) Danny Akiyama submitted a declaration stating that, although he used to have a business called Executive Business & Tax Service, he "did not write or send that email." (Akiyama Declaration ¶ 4.) He says he does "not wish [Plaintiffs] any harm and would never threaten them, much less cause them harm." (*Id.* ¶ 7.)

Plaintiffs' counsel also "received numerous derogatory telephone calls at [his] law office." (Rosen Declaration ¶ 3.) One such conversation went as follows:

> [Caller:] Hey, are you the attorney suing Kamehameha Schools?
> [Rosen:] Yes, how can I help you?
> [Caller:] So good for you that everyone is going to know who your clients are. Now, both you and your haole clients can get the lickins' you deserve. Why do you f***ing haoles even come to Hawaii . . . ?

(*Id.* (asterisks inserted).)

Based on the foregoing, Plaintiffs seek a reversal of the Order Denying Anonymity.

STANDARD OF REVIEW

The Local Rules provide three grounds for reconsideration of interlocutory orders: (1) discovery of new material facts not previously available; (2) intervening change in law; or (3) manifest error of law or fact. Local Rule 60.1. A successful motion for reconsideration must accomplish two goals. "First, a motion for reconsideration must demonstrate some reason why the Court should reconsider its prior decision. Second, the motion must set forth facts or law of a 'strongly convincing' nature to induce the court to reverse its prior decision." *Jacob v. United States*, 128 F. Supp. 2d 638, 641 (D. Haw. 2000). "Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

DISCUSSION

Plaintiffs seek reconsideration of the Order Denying Anonymity in light of the above comments, phone call conversation, and email that were not previously available. Local Rule 60.1. Plaintiffs contend these communications are threats that would lead a reasonable person to believe that Plaintiffs might be physically or financially harmed if their identities are made public.

As discussed in the Order Denying Anonymity, the Federal Rules of Civil Procedure embody the presumption of openness in judicial proceedings. Order Denying Anonymity at 5. Notwithstanding that presumption, "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." *Does I Thru XXIII v. Advanced Textile Corp.*,

214 F.3d 1058, 1068 (9th Cir. 2000) ("*Advanced Textile*"). In determining whether anonymity is appropriate, this Court should evaluate the following factors: (1) the severity of the threatened harm, (2) the reasonableness of Plaintiffs' fears, (3) Plaintiffs' vulnerability to retaliation, (4) the precise prejudice to Defendants, and (5) whether the public's interest would best be served by requiring Plaintiffs to reveal their identities. *Id.* The burden is on Plaintiffs to prove the need for anonymity outweighs Defendants' prejudice and the public's interest. *Id.* The Ninth Circuit has held that plaintiffs may remain anonymous where they demonstrate "an objectively reasonable fear of extraordinarily severe retaliation" that outweighs the defendants' prejudice and the public's interest. *Id.* at 1063, 1069.

In their Motion for Reconsideration, Plaintiffs point to the new comments detailed above, arguing they are evidence of threats of harm that they reasonably fear. The new evidence, however, is of the same character and nature as the evidence this Court previously considered and is no more probative of a severe threat of harm or a reasonable fear of harm.

Among the hundreds of internet comments posted in response to the Honolulu Advertiser and Honolulu Star Bulletin news articles, Plaintiffs point only to three anonymous comments as threats of harm. One comment by "former local boy" states that he "would have more respect for those that want to sue this private school if they were willing to do it in an open manner so everyone knows who they are." (Ex. 6.) The comment by "ahhh" expressly states that it is not meant to be taken as a threat. (Ex. 8 ("Don't be scared, it's in the Halloween spirit.").) "Ahhh" makes clear that he or she does not "want anything bad to happen to the kids."

(*Id.*) In fact, another comment by "ahhh" states: "No one wants to see any of the kids hurt by this. The people I know would fight to the death to save these kids if anyone tries to harm them." (Ex. C.) The comment by "Great Kid" is unclear and nonsensical. (Ex. 7.) None of these anonymous comments contain any threats of harm against Plaintiffs.[2]

Plaintiffs rely primarily on anonymous internet comments in support of the underlying motion and the present Motion For Reconsideration. However, every major story posted online by the Honolulu Advertiser and Honolulu Star Bulletin stirs a parade of off-the-wall anonymous commentary. Indeed, a hallmark of the internet is that people may post comments anonymously or under pseudonyms and the public may never know their true identities. This invites commentators to make outrageous statements under a veil of secrecy.

The Honolulu Advertiser itself recognizes this problem. In March 2008, the Advertiser "opened up the option . . . for readers to comment on every story." (Ex. A.) Since then, the Advertiser "has seen a steady rise of hateful name-calling, innuendo and inane drivel, all of it anonymous." (*Id.*) The Advertiser has taken steps to address the problem, but acknowledges that "we are unable to monitor the thousands of thoughts we get each day" and that requiring commentators to "post their real names would be futile, as it simply cannot be enforced." (*Id.*) The Honolulu Star Bulletin is no different.

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[2] As in the Order Denying Anonymity "this Court focuses on the threats directed at Plaintiffs" and not at Plaintiffs' counsel. Order Denying Anonymity at 9.

Like the internet comments, the phone call and email to Plaintiffs' counsel are no more probative of a threat of harm to Plaintiffs than evidence this Court previously reviewed. Danny Akiyama says he "did not write or send that email" and does "not wish [Plaintiffs] any harm." (Akiyama Declaration ¶¶ 4, 7.) The phone call is also anonymous and voices frustration with the lawsuit but does not show a severe threat of harm. *Cf. Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 217 (E.D. Tex. 1997) ("The threat of hostile public reaction to a lawsuit . . . will only with great rarity warrant public anonymity.").

Plaintiffs' evidence confirms that, under the cloak of anonymity, people will make outrageous, offensive, and even nonsensical statements. The evidence does not warrant anonymity, however. Considering all the evidence before the Court, Plaintiffs continue to establish, at most, that they are vulnerable children who have a reasonable fear of social ostracization and negative press for their involvement in this case. The new evidence does not tip the scales any differently.[3] Against the backdrop of hundreds of anonymous comments made in response to the Order Denying Anonymity, Plaintiffs offer only a handful of comments, none of which show an "objectively reasonable fear of extraordinarily severe retaliation." *Advanced Textile*, 214 F.3d at 1063, 1069. Even with the new evidence, Plaintiffs have not shown a sufficient "need for anonymity" that trumps the "presumption, firmly rooted in American law, of openness in judicial proceedings." *Doe 1 v. Merten*, 219 F.R.D. 387,

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[3] The Court previously considered each of the *Advanced Textile* factors separately, and the new evidence does not warrant doing so here.

390 (E.D. Va. 2004). Because Plaintiffs do not set forth facts of a "strongly convincing" nature to induce the Court to reverse its prior decision, reconsideration is denied. *Jacob*, 128 F. Supp. 2d at 641.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion For Reconsideration is DENIED.

DATED: Honolulu, Hawaii, December 31, 2008.

IT IS SO ORDERED.

/S/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

[SEAL]

Doe v. Kamehameha School/Bernice Pauahi Bishop Estate, et al., Civ. No. 08-00359 JMS-BMK; ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JACOB DOE, et al.,	)	Civ. No. 08-00359 JMS-BMK
	)	
Plaintiffs,	)	ORDER DENYING
	)	PLAINTIFFS' MOTION
vs.	)	FOR LEAVE TO PRO-
	)	CEED ANONYMOUSLY
KAMEHAMEHA	)	AND FOR RELATED
SCHOOLS/BERNICE	)	PROTECTIVE ORDER
PAUAHI BISHOP	)	
ESTATE, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO PROCEED ANONYMOUSLY AND FOR RELATED PROTECTIVE ORDER

Before the Court is Plaintiffs' Motion For Leave To Proceed Anonymously and For Related Protective Order. The Court heard this Motion on October 21, 2008. After careful consideration of the Motion, the supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is DENIED. Plaintiffs must disclose their identities, but that disclosure is stayed for ten days from the date this order is filed.

FACTUAL BACKGROUND

Plaintiffs[1] filed this lawsuit to challenge the legality of certain policies and practices implemented by Defendants[2] with respect to admission to campuses that are part of KSBE. (Complaint ¶ 1.) Specifically, Plaintiffs challenge Defendants' admissions policy of granting a "preference" on the basis of "Hawaiian ancestry." (*Id.*) Plaintiffs assert this policy "operates to admit students without any Hawaiian ancestry only after all qualified applicants with such ancestry have been admitted." (*Id.* ¶ 14.)

Each Plaintiff claims to have applied for admission to a KSBE campus for the 2008-2009 school year without success even though they say they meet "all of the qualifications for admission except for his or her race or ancestry." (*Id.* ¶ 7.) In other words, Plaintiffs allege that, "were they of 'Hawaiian ancestry,' they would have been admitted to a KSBE campus on the basis of their applications for the 2008-09 school year." (*Id.* ¶ 16.)

The Complaint prays for, among other things, "a declaration that any of Defendants' current admissions policies or practices that grant a self-described 'preference' on the basis of 'Hawaiian ancestry' violate 42 U.S.C.

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[1] Each Plaintiff is a minor who brings this action by his or her respective parent(s) as next friend(s). Plaintiffs are (1) Jacob and Janet Doe, by their parents and next friends James and Joyce Doe, (2) Karl Doe, by his parents and next friends Kirk and Kate Doe, and (3) Lisa Doe, by her mother and next friend, Laura Doe.

[2] Defendants are Kamehameha Schools/Bernice Pauahi Bishop Estate ("KSBE") and KSBE Trustees Nainoa Thompson, Diane J. Plotts, Corbett A.K. Kalama, Robert K.U. Kihune, and J. Douglas Ing.

§ 1981 and are therefore illegal and unenforceable." (*Id.* Prayer For Relief.) Plaintiffs acknowledge that this Court and the Ninth Circuit previously rejected a "virtually identical claim" in *Doe v. Kamehameha Schools / Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827, 849 (9th Cir. 2006) (en banc) ("*Doe 1*") ("Because the Schools are a wholly private K-12 educational establishment, whose preferential admissions policy is designed to counteract the significant, current educational deficits of Native Hawaiian children in Hawaii, and because in 1991 Congress clearly intended § 1981 to exist in harmony with its other legislation providing specially for the education of Native Hawaiians, we must conclude that the admissions policy is valid under 42 U.S.C. § 1981.").[3] By pursuing the present action, Plaintiffs "intend . . . to have that ruling overturned in the Supreme Court of the United States." (Complaint ¶ 2.)

In early August 2008, Plaintiffs' counsel proposed that the parties enter into a stipulated protective order that would permit Plaintiffs to proceed anonymously, as the parties in *Doe 1* had so stipulated. (Declaration of Eric Grant ¶ 15.) Defendants' counsel rejected the proposal. (*Id.* ¶ 16.) As a result, Plaintiffs brought this Motion, seeking leave to proceed anonymously under the pseudonyms used in the Complaint.[4]

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[3] After the Ninth Circuit's en banc decision in favor of Defendants, the plaintiff in *Doe 1* filed a timely petition for writ of certiorari in the Supreme Court. (Plaintiffs' Ex. 9 ¶ 4.) While the petition was pending, the plaintiff entered into a settlement agreement with Defendants. (*Id.* ¶ 5.)

[4] This Court signed a Stipulated Interim Protective Order Regarding Identities of Plaintiffs on September 25, 2008, in

(continued...)

STANDARD OF REVIEW

Courts have the discretion to grant protective orders pursuant to Federal Rules of Civil Procedure Rule 26(c), which provides that a party may move for a protective order and that the court "may, for good cause, issue an order to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense." "The Supreme Court has interpreted this language as conferring 'broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.'" *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Id.* at 1210-11.

DISCUSSION

Federal Rules of Civil Procedure Rule 10(a) commands that the title of every complaint "must name all the parties." Fed. R. Civ. P. 10(a). This Rule "protects the public's legitimate interest in knowing all of the facts involved in a case, including the identities of the parties." *Doe v. Beaumont Indep. Sch. Dist.*, 172 F.R.D. 215, 216 (E.D. Tex. 1997) ("*Beaumont*"). "This rule embodies the presumption, firmly rooted in American law,

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[4] (...continued)
which Plaintiffs' counsel agreed to disclose Plaintiffs' identities to one of Defendants' counsel who may in turn disclose that information to certain individuals. In an effort to keep Plaintiffs' identities confidential while considering the instant Motion, the Court also signed stipulated orders allowing the parties to file supplemental papers relating to this Motion under seal.

of openness in judicial proceedings," which "harks back to the English common law, where there existed a rule of openness in both criminal trials and civil proceedings." *Doe 1 v. Merten*, 219 F.R.D. 387, 390 (E.D. Va. 2004); *see Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979) (noting the "common-law rule of open civil and criminal proceedings"). Additionally, there exists a "clear and strong First Amendment interest in ensuring that 'what transpires in the courtroom is public property.'" *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947)). The presumption of openness in judicial proceedings "promotes 'public scrutiny of the judicial process, improves the quality of testimony, encourages public respect for the judicial system, and provides therapeutic value to the community.'" *Merten*, 219 F.R.D. at 391.

Notwithstanding the presumption of openness, in *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) ("*Advanced Textile*"), the Ninth Circuit held that a party may preserve his or her anonymity in "special circumstances." In that case, the plaintiffs were foreign factory workers in Saipan who claimed their employers violated the Fair Labor Standards Act. *Id.* at 1063. The plaintiffs had been induced into signing employment contracts, were required to pay several thousands of dollars in debt to employment "recruiters," and were fearful that their lawsuit would prompt retaliation in the form of physical violence, deportation, arrest in their home country, and acceleration of their debts. *Id.* at 1063-65. The plaintiffs consequently moved for leave to proceed under fictitious names, which the district court denied. *Id.* at 1064.

On appeal, the Ninth Circuit held that "a party may preserve his or her anonymity in judicial proceedings in

special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." *Id.* at 1068. The court also ruled that, where pseudonyms are used "to shield the anonymous party from retaliation, the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation." *Id.* (internal citations omitted). A court must also determine the precise prejudice to the opposing party and whether the public's interest would best be served by requiring litigants to reveal their identity. *Id.* The burden is on the party seeking anonymity to prove the need for anonymity outweighs the other party's prejudice and public interest. *Id.* Because the plaintiffs demonstrated "an objectively reasonable fear of extraordinarily severe retaliation" that outweighed the defendants' prejudice and the public's interest, the Ninth Circuit held that they may conceal their identities. *Id.* at 1063, 1069.

Here, the parties agree that, in determining whether Plaintiffs may proceed anonymously, this Court must balance the *Advanced Textile* factors. The Court addresses each factor in turn.

A. Severity of the Threatened Harm

Plaintiffs argue they fear threatened physical, economic, and social harm from the "public at large" if their identities are disclosed.[5] (Motion at 8.) Defendants

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[5] Plaintiffs make clear they are "fearful of '*public* harassment and retaliation,' as reflected in '*public* threats and other

(continued...)

maintain there is "no history of any such harm to plaintiffs who have challenged Native Hawaiian preferences and entitlements" and that the threat of hostile public reaction "will only with great rarity warrant public anonymity." (Opp. at 10-15.)

As evidence of threats of harm that Plaintiffs fear, they point to comments made about a student who previously challenged Defendants' admissions policy, to acts of physical violence in the community, and to internet comments regarding Plaintiffs in this case.

First, Plaintiffs point to newspaper articles discussing public comments made after Defendants were ordered to admit into their school Brayden Mohica-Cummings, a non-Hawaiian student who had challenged Defendants' admissions policy in a separate case. (Motion at 2; Plaintiffs' Exs. 3-4.) Plaintiffs note that the severity of public threats against Mohica-Cummings was serious enough to prompt United States Attorney Ed Kubo to issue a warning against "any violence or threats of violence." (Plaintiffs' Exs. 3-4.) Although Kubo did issue such a warning, he was "unaware of any credible threats against Brayden Mohica-Cummings." (Plaintiffs' Ex. 4.) Additionally, after Kubo's warning was announced, Mohica-Cummings's own attorney "said [the warning] was unnecessary." (Defendants' Ex. D at 2.) Considering that no credible threats were known to Kubo at the time of the warning and that Mohica-Cummings's attorney said the warning was unnecessary, the news articles do not support Plaintiffs' fear of threatened harm.

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[5] (...continued)
vitriol, *not* with possible 'retaliation and ostracism at [the school] if and when they are admitted.'" (Reply at 3 n.2 (emphases in original).)

Plaintiffs also offer news articles about physical attacks on minors and adults that were based on their race, sex, and disability and in which the words "f----- haole" were used.[6] (Plaintiffs' Exs. 6-8.) These attacks were not connected to any of the parties in this action, nor do they involve threats against anyone challenging Defendants' admissions policy. The articles are not evidence of threats against Plaintiffs.

Plaintiffs also point to internet comments posted in response to news articles about this lawsuit. (Plaintiffs' Exs. 10-20.) The internet comments are posted by anonymous persons and are directed at Plaintiffs and their attorneys. (Plaintiffs' Exs. 11-12, 14-20.) But even Plaintiffs acknowledge "the crucial distinction between Plaintiffs' counsel and Plaintiffs themselves: established professionals versus vulnerable children." (Reply at 10.) Plaintiffs' counsel do not seek to proceed anonymously, and they do not claim to fear retaliation. Thus, for purposes of deciding whether Plaintiffs' threatened harm is severe, this Court focuses on the threats directed at Plaintiffs.

Of all the internet comments highlighted by Plaintiffs, only four are conceivably made against Plaintiffs. The first two comments are:

> Just think how much more fun it would be at [the school] if they could celebrate Kill Haole Day like all the other schools!"

and

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[6] "'Haole' is a Hawaiian word often used to describe a Caucasian person." *Chenoweth v. Maui Chem. & Paper Prods., Inc.*, CV. No. 07-00092 DAE-KSC, 2008 WL 4107906, at *7 n.3 (D. Haw. Sept. 3, 2008).

> this is all for the money. why not go to [the University of Hawaii] or [Hawaii Pacific University]? why go somewhere youre not wanted? Youre jus gonna get lickens everyday and drop out anyway, so why bother?

(Plaintiffs' Ex. 11 at 1, Ex. 12 at 1.) These comments are aimed at how Plaintiffs might be treated if they are admitted to Defendants' school. However, Plaintiffs explicitly state that they are not fearful of "retaliation and ostracism at KS if and when they are admitted." (Reply at 3 n.2.) Thus, these comments are not indicative of threatened harm.

The other comments directed at Plaintiffs state:

> These 4 kids and their families should be ashamed of themselves for trying to make a quick buck even their attorneys! Auwe[7] to the Haoles! Kamehameha Schools be the Warriors for all of us hawaiians now!

and

> When the economy is DOWN, we in the USA are up in LETS SUE! for money! This is just a vision of how people try to screw others tradition and their "will" for their greed. For profit or greed they try to take the "dead of a loved one". before Hawaii turning USA or not. a will should be honored regardless . . . Now lets imagine, what they're doing . . . will come around one way or another back to them. Karma do[es] happen.

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[7] "Auwē" means "Oh! Oh dear! Oh boy! Alas! Too bad! Goodness!" Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 31 (Revised and Enlarged ed. 1986).

(Plaintiffs' Ex. 20 at 4; Ex. 19 at 2 (ellipses points in original).) These comments are not threats but do voice the commentators' frustration with this lawsuit, as do other comments in Plaintiffs' Exhibits. Indeed, none of Plaintiffs' evidence shows any threat of physical violence or economic harm against Plaintiffs, although the declarations of Plaintiffs' parents state their subjective fear of such retaliation. At most, Plaintiffs' evidence suggests they may be socially ostracized. This is unlike the *Advanced Textile* plaintiffs' fear of "extraordinary retaliation [of] deportation, arrest, and imprisonment." 214 F.3d at 1063, 1071. Without more, the threatened harm Plaintiffs fear is not severe, and this factor therefore weighs in favor of denying anonymity.

B. Reasonableness of Plaintiffs' Fears

This Court must also consider the reasonableness of Plaintiffs' fears. *Advanced Textile*, 214 F.3d at 1071. Plaintiffs "are not required to prove that the defendants intend to carry out the threatened retaliation." *Id.* "What is relevant is that plaintiffs were threatened, and that a reasonable person would believe that the threat might actually be carried out." *Id.*

Plaintiffs' parents state their subjective fear of physical, economic, and social retaliation. (James Doe Declaration ¶¶ 6-8; Kate Doe Declaration ¶¶ 6-8; Laura Doe Declaration ¶¶ 6-8.) As discussed above, the only "threats"—or, more accurately, comments—directed at Plaintiffs suggest they may be socially ostracized. Plaintiffs contend that their fears are reasonable in light of Ed Kubo's warning prompted by the Mohica-Cummings lawsuit, the news articles of physical attacks unrelated to the parties here, and the declaration of the plaintiff's mother in *Doe 1* who says they "fear for our safety if our

identities are made public." But without evidence of any threats of physical violence or economic harm against them, a reasonable person would not believe that Plaintiffs might be physically or financially harmed. *See Advanced Textile*, 214 F.3d at 1071 ("What is relevant is that plaintiffs were threatened . . . .").

Moreover, because the merits of this action have already been decided by the Ninth Circuit, this case will likely conjure less public reaction than did the Mohica-Cummings and *Doe 1* lawsuits.[8] Unlike in those cases where this Court was faced with deciding the merits of Defendants' admissions policy for the first time, we now have the Ninth Circuit's en banc decision in favor of Defendants. The issues that will be litigated in this Court are not so controversial. Thus, at this point in the case, the issues to be decided will trigger little, if any, emotional reaction by the public.

Plaintiffs also point to the internet comments about this case as evidence that their fears are reasonable. The comments were posted by anonymous persons who were reacting to news articles about the filing of this lawsuit. Like in *Beaumont*, 172 F.R.D. at 217, the comments "contain[] disapproval and frustration by some local citizens for bringing this suit." As in that case, however, the record here lacks any threats against Plaintiffs. Without evidence of any threats against Plaintiffs and considering that this Court is bound by the Ninth

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[8] No evidence in the record suggests that Mohica-Cummings or the plaintiff in *Doe 1* was harmed. In fact, the record shows that Mohica-Cummings and Kalani Rosell, another non-Hawaiian student who was admitted into one of Defendants' schools, have been warmly welcomed at their respective schools. (Defendants' Exs. C-D.)

Circuit's ruling in Defendants' favor, a reasonable person would not believe that the anonymous internet commentators would harm Plaintiffs.

C. Plaintiffs' Vulnerability

Plaintiffs contend they are particularly vulnerable because they are children. (Motion at 10.) Defendants agree that this factor "does weigh in favor of anonymity" because Plaintiffs are minors, though they argue that "Plaintiffs have provided no evidence that the minor plaintiffs are vulnerable to retaliation." (Opp. at 24.) Because "[t]he vulnerability of . . . minor plaintiffs is undoubtedly real," *Beaumont*, 172 F.R.D. at 216, this factor weighs in favor of keeping Plaintiffs' identities anonymous.

D. Prejudice to Defendants

This Court must determine the precise prejudice to Defendants at each stage of the proceedings if Plaintiffs are permitted to proceed anonymously. *Advanced Textile*, 214 F.3d at 1068. Defendants argue they will be prejudiced because allowing Plaintiffs to proceed anonymously will (1) "validate their outrageous and unfounded charges against" Defendants, (2) allow Plaintiffs to portray themselves "sympathetically," and (3) hinder Defendants' ability to gather evidence from third parties regarding Plaintiffs' claim for damages and their standing in this lawsuit. (Opp. at 25-29.)

The Court disagrees with Defendants that allowing Plaintiffs to proceed anonymously will validate any "outrageous and unfounded charges" against them. The law in the Ninth Circuit regarding the merits of this case is already settled in Defendants' favor. Permitting anonymity will not validate Plaintiffs' claims in any way.

Defendants also argue that, "[i]f Plaintiffs are allowed to maintain their anonymity, Defendants will have no way to counter their attorneys' attempts to portray them sympathetically" in the media. (Opp. at 27.) In response, Plaintiffs say they "are willing to agree (as part of the protective order they seek) that their counsel not speak 'sympathetically' about them in public." (Reply at 12 n.9.) Defendants' concern is therefore mitigated, and they will not be prejudiced by Plaintiffs' portrayal in the media. *Cf. Advanced Textile*, 214 F.3d at 1068 (noting that courts must determine "whether proceedings may be structured so as to mitigate that prejudice").

The Court also rejects Defendants' argument that they will be prejudiced when seeking "discovery on damages (from) third parties." (Opp. at 29.) Given the Ninth Circuit's ruling in *Doe 1*, this case will have to proceed through the Ninth Circuit and the Supreme Court's discretionary review before damages become an issue. At this point in the proceedings, no discovery as to damages is necessary, and Defendants are not prejudiced in this regard.

Lastly, Defendants argue that their "ability to litigate the important threshold issue of standing will also be unfairly burdened," even if Plaintiffs are willing to provide their names to defense counsel for purposes of standing-related discovery. (Opp. at 28.) At the hearing on this Motion, Defendants' counsel stated his intent to challenge Plaintiffs' standing in this case and to conduct discovery from third parties on that issue. The Court noted that discovery from third parties, if any, will likely be very limited. Defense counsel agreed and stated that Defendants intend to first seek discovery from the parties themselves and may not have to conduct any third party discovery. Thus, it remains speculative

whether anonymity will burden any third party discovery.

Defendants do intend to depose Plaintiffs and their parents, however, and plan on seeking documents from Defendants' own employees, including its admissions office. Such discovery will be burdened if Plaintiffs' identities are kept secret. For example, if Defendants seek Plaintiffs' application records from the school's admissions office, Defendants will have to ensure that care is taken to keep Plaintiffs' identities from staff who may need to assist in obtaining those documents. Moreover, even if Plaintiffs' names are not revealed, it will be difficult for Defendants to ensure that other identifying information remains confidential. Plaintiffs already brought to the Court's attention their concern that defense counsel used identifying information in an email sent to them. Even in *Doe 1*, confidential settlement terms were disclosed to the media. Given this history of disputes over confidential information, and considering that Defendants' standing-related discovery from the parties themselves will be hampered, this factor weighs in favor of denying anonymity. *See, e.g., Merten*, 219 F.R.D. at 394 (concluding that the defendants may be prejudiced if the plaintiffs were allowed to proceed anonymously because the defendants "must in fairness be allowed to explore whether plaintiffs have standing, which they can do only if plaintiffs are identified").

E. Public's Interest

Plaintiffs contend that the public's interest in knowing their identities is "non-existent" because "disguising plaintiffs' identities will [not] obstruct public scrutiny of the important issues" and "will serve the public's interest in this lawsuit by enabling it to go forward." (Motion

at 11-12; Reply at 15.) Defendants argue that the "public has the right to know the identity of Plaintiffs and the complete basis for any decision either in their favor or against them, specifically that Plaintiffs have at best marginal qualifications to attend KS and . . . were denied admission based upon facts and circumstances which have nothing to do with their ancestry." (Opp. at 29-30.)

As discussed above, "Plaintiffs' use of fictitious names runs afoul of the public's common law right of access to judicial proceedings." *See Advanced Textile*, 214 F.3d at 1067. Plaintiffs' parents each declare that, "if faced with the choice between revealing my child's identity to the public or having to terminate my family's participation in the lawsuit, [we] almost certainly would choose the latter." (James Doe Declaration ¶ 10; Kate Doe Declaration ¶ 10; Laura Doe Declaration ¶ 10.) Although the public does have an interest in seeing this case go forward, *Advanced Textile*, 214 F.3d at 1073, "[t]he people have a right to know who is using their courts." *United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008). Plaintiffs and Defendants agree this case presents extremely controversial and very important issues in Hawaii. (Motion at 3; Opp. at 5.) As in other civil rights cases, the public has a strong interest in knowing who is using the courts to vindicate their rights.

Furthermore, Defendants intend to challenge Plaintiffs' standing in this case. When such a motion is brought, this Court will issue an order on the motion. If Plaintiffs' identities are kept secret from the public, the Court's order will have to speak in very general terms or be sealed if identifying information is discussed. In either case, the public might not "fully understand the basis for the Court's decision" as to standing. (Opp. at 30.) Thus, this is not a case where party anonymity

would "not obstruct the public's view of the issues." *See Advanced Textile*, 214 F.3d at 1068 (citing *Stegall*, 653 F.2d at 185). Accordingly, the public interest in seeing this case go forward is outweighed by the public's "right to know who is using their courts." *Stoterau*, 524 F.3d at 1013. This factor therefore weighs in favor of denying anonymity.

F. Balancing the Factors

Plaintiffs may preserve their identity if they prove the severity of their threatened harm, the reasonableness of their fears, and their vulnerability outweigh the prejudice to Defendants and the public's interest in knowing their identity. *Advanced Textile*, 214 F.3d at 1068. If Plaintiffs have not asserted enough to establish a need for anonymity, "this cannot outweigh the prejudice" to Defendants. *Texaco, Inc.*, 2006 WL 2850035, at *6.

The severity of the threatened harm and the reasonableness of Plaintiffs' fears do not weigh in favor of anonymity. At most, Plaintiffs are vulnerable children who have a reasonable fear of social ostracization. However, "[t]he threat of hostile public reaction to a lawsuit . . . will only with great rarity warrant public anonymity." *Beaumont*, 172 F.R.D. at 217.

Unlike in *Advanced Textile*, where the plaintiffs were vulnerable to physical violence, deportation, and imprisonment, Plaintiffs here fail show a sufficient "need for anonymity." 214 F.3d at 1068. "This cannot outweigh the prejudice such an order would work on [D]efendants, even at this stage of the proceedings." *Texaco, Inc.*, 2006 WL 2850035, at *6. Indeed, Defendants will be prejudiced as to their standing-related discovery, and the public has a significant interest in knowing who Plaintiffs are. Therefore, Plaintiffs' need for anonymity

does not outweigh prejudice to Defendants and the public's interest in this case. *See Advanced Textile*, 214 F.3d at 1068.

The federal courts have heard many controversial education-related civil rights cases brought by minor plaintiffs who proceeded in their own names. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (minor plaintiff and parent challenging prayer readings at middle school graduation ceremony); *Runyon v. McCrary*, 427 U.S. 160 (1976) (minor plaintiffs challenging school's policy of denying admission based on race); *Lau v. Nichols*, 414 U.S. 563 (1974) (class action brought by non-English speaking Chinese minors challenging "unequal educational opportunities"); *Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963) (minor plaintiffs and parents challenging daily Bible readings at school); *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954) (minor plaintiffs seeking admission to public schools on a nonsegregated basis); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (minor plaintiffs challenging mandatory pledge of allegiance). Only in an "unusual case" may plaintiffs proceed anonymously. *Advanced Textile*, 214 F.3d at 1067. Where, as here, Plaintiffs have not shown their need for anonymity outweighs Defendants' prejudice and the public interest in this case, there is no need to deviate from the "presumption, firmly rooted in American law, of openness in judicial proceedings." *Merten*, 219 F.R.D. at 390; *see also Advanced Textile*, 214 F.3d at 1068. Plaintiffs seek the protections and benefits of litigating their action, and they must do so openly.

G. Disclosure of Plaintiffs' Identities Is Temporarily Stayed

Plaintiffs' parents state in their declarations that they may terminate their families' participation in this lawsuit if their children are not permitted to proceed anonymously. (James Doe Declaration ¶ 10; Kate Doe Declaration ¶ 10; Laura Doe Declaration ¶ 10.) The Court understands that Plaintiffs may need some time to decide whether to pursue this action. The Court therefore stays the disclosure of Plaintiffs' identities for ten days from the date this order is filed.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion For Leave To Proceed Anonymously and For Related Protective Order is DENIED. The disclosure of Plaintiffs' identities is stayed for ten days from the date this order is filed.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 28, 2008.

/S/ Barry M. Kurren

[SEAL] Barry M. Kurren
United States Magistrate Judge

Doe v. Kamehameha School/Bernice Pauahi Bishop Estate, et al., Civ. No. 08-00359 JMS-BMK; ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO PROCEED ANONYMOUSLY AND FOR RELATED PROTECTIVE ORDER.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOB DOE, a minor, by parents and next friends, James and Joyce Doe; JANET DOE, a minor, by parents and next friends, James and Joyce Doe; KARL DOE, a minor, by parents and next friends, Kirk and Kate Doe; LISA DOE, a minor, by mother and next friend, Laura Doe,

Plaintiffs-Appellants,

v.

KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE; NAINOA THOMPSON, in his capacity as Trustee; DIANE J. PLOTTS, in her capacity as Trustee; CORBETT A.K. KALAMA, in his capacity as Trustee; ROBERT K.U. KIHUNE, in his capacity as Trustee; J. DOUGLAS ING, in his capacity as Trustee,

Defendants-Appellees.

No. 09-15448

D.C. No. 1:08-cv-00359-JMS-BMK

District of Hawaii, Honolulu

ORDER

Filed November 8, 2010

Before: Robert R. Beezer, Susan P. Graber and Raymond C. Fisher, Circuit Judges.

Order;
Dissent by Chief Judge Kozinski;
Dissent by Judge Reinhardt;
Concurrence by Judge Beezer

ORDER

The panel has voted to deny the petition for panel rehearing. Judges Graber and Fisher vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Chief Judge KOZINSKI, dissenting from the denial of rehearing en banc:

These are some of the threats made after plaintiffs, four non-native Hawaiian children, filed their civil rights suit:

- It's about time that someone put some pressure on these litigious people and their kids! (online post)

- 4 kids . . . . will need 10 bodyguards lol (online post)

- Good that the judge ordered them to make these little brats names known to the public, so they can be tormented (online post)

- Sacrifice them!!!!!!!! (online post)

- [If their names were revealed, the Does] would have to watch their backs for the rest of their lives! (online post)

- [E]veryone is going to know who your clients are. . . . [Y]ou and your haole [white] clients can get the lickins' you deserve. Why do you fucking haoles even come to Hawaii . . . ? (said over the phone to the Does' attorney)

If threats like that were made against me or my family, I'd be worried. I'd call the U.S. Marshals, as federal judges are repeatedly cautioned to do when targeted by a threat, whether it's made in person, by mail, by telephone or over the internet. I doubt I'm alone. My guess is that most federal judges, including those who decided this case here and below, would take such threats directed against *them* seriously; the speakers, if they could be identified, might well be prosecuted. *See, e.g.*, Mark Fass, *Blogger Found Guilty of Threatening Judges in Third Federal Trial*, N.Y. L.J., Aug. 16, 2010, at 1.

I believe that the federal courts must be safe havens for those who seek to vindicate their rights. No litigant should fear for his safety, or that of his family, as a condition of seeking justice. Sure, if the purported fear is that they will be captured by Martians and served as dinner, that can be dismissed as fanciful. But when there are real statements, oral and written, that suggest

or urge physical violence on account of the lawsuit, how can we force parents to the grim choice of abandoning the rights of their children or exposing them to the risk that they "would have to watch their backs for the rest of their lives!"? I don't believe that we should have a double standard—one for ourselves and another one for the parties before us—and so have no difficulty concluding that the district court here egregiously abused its discretion when it denied plaintiffs the right to proceed as Does.

Fortunately, the matter is not beyond repair. When the case returns to the district court, I expect that plaintiffs will seek to set aside the dismissal of their claims, perhaps under Fed. R. Civ. P. 60(b), so they can file a complaint that complies with Fed. R. Civ. P. 5.2(a). I'm confident that the district court will grant them such relief; it would be a travesty if it did not. After all, the court is charged with safeguarding the rights of the litigants, and I find it passing strange that the district judge, the magistrate judge and their staffs all overlooked a rule of which they are reminded every time they log into PACER. Indeed, all who log in are required to check a box indicating that they have read, understand and will comply with the following notice:

> IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; financial account numbers; and, in criminal cases, home addresses, in compliance with Fed. R. Civ. P. 5.2 or Fed. R. Crim. P. 49.1. This requirement applies to all documents, including attachments.

The failure to bring this rule to the attention of the parties, and advise them of their right and responsibility to abide by it, seems like the kind of oversight the district court would be anxious to set right, perhaps even sua sponte. Plaintiffs should not be denied a chance to vindicate their rights because the court blundered its responsibility to ensure the parties safeguard the identities of minor children, as mandated by Rule 5.2(a).

Setting aside the district court's judgment and proceeding under Rule 5.2(a) should also be desirable from the perspective of defendant, the Kamehameha Schools. The difficult legal issue that lies at the heart of this dispute was resolved in its favor in our en banc court by the narrowest of margins. *Compare Doe v. Kamehameha Schools / Bernice Pauahi Bishop Estate*, 470 F.3d 827, 829 (9th Cir. 2006) (en banc) (admissions policy giving preference to Native Hawaiians did not violate 42 U.S.C. § 1981), *with id.* at 857 (Bybee, J., dissenting) (policy "amounts to a classic violation of § 1981"). The issue will remain unsettled until the Supreme Court has had an opportunity to address it. "Liberty finds no refuge in a jurisprudence of doubt," the Supreme Court famously told us in another context. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992). The parties here, and defendant in particular, must surely wish that doubt about the legality of the Schools' admissions policy be laid to rest. I hope and trust that defendant will not oppose—and indeed will support—reinstating plaintiffs' complaint under the protective umbrella of Rule 5.2(a) so this uncertainty can be resolved once and for all.

REINHARDT, Circuit Judge, with whom Chief Judge KOZINSKI joins, dissenting from the denial of rehearing en banc:

Our court inexplicably and contrary to all precedent holds that a district judge acts within his discretion when, in a racially charged environment, he requires juveniles to publicly disclose their names, and put their physical and mental well-being at risk, in order to bring a civil rights lawsuit in federal court. *Doe v. Kamehameha*, 596 F.3d 1036, 1041, 1044-45 (9th Cir. 2010). Because it is entirely unacceptable to ask minors to test the seriousness of the "undoubtedly severe" threats that have been made against them in order to gain access to the federal legal system, I strongly dissent from the court's refusal to hear this case en banc. *Id.* at 1043. I also dissent because the members of the three judge panel, like the district judge and the magistrate judge before them, were apparently unaware that a special rule applies to the right of juveniles to litigate anonymously, and thus failed to consider the federal rule of civil procedure which permits juvenile litigants to assert anonymity in the ordinary course of civil litigation. In sum, the decision this court declines to take en banc results from a failure to consider the applicable rule regarding juvenile litigants and, even more important, reflects an indefensible insensitivity to the rights and vulnerabilities of minors seeking to enforce their civil rights.

The young would-be plaintiffs in this case were white students who brought a suit for admission to a natives-only Hawaiian school in what the United States Attorney had declared to be a racially charged environment. The minor litigants, whose names had not yet been disclosed, were subjected to what even the panel terms "threats of physical retaliation [that were] undoubtedly

severe," *id.*, anonymous threats made over the internet, such as "4 kids . . . will need 10 bodyguards lol," "Sacrifice them!!!!!!!!," and that they "would have to watch their backs for the rest of their lives!" *Id.* at 1041. Both the magistrate and district judges denied plaintiffs' request to proceed anonymously, notwithstanding declarations that the plaintiffs would almost certainly dismiss their lawsuit rather than disclose their identities. The panel—despite its apparent skepticism of the combined reasoning of the magistrate judge and district judge, which it treated as interchangeable—affirmed solely because it concluded that the district judge, though probably wrong, did not abuse his discretion. In fact, both the district judge and the magistrate judge made many errors of law amounting to an abuse of discretion, including the failure to so much as acknowledge Federal Rule of Civil Procedure 5.2(a), which provides for the anonymity of juveniles in federal litigation. Only by failing to recognize that the abuse of discretion standard does not relieve this court of its obligation to engage in a meaningful review of the decision below could the panel have issued a ruling so out-of-step with the history of juvenile litigation, and only by failing to recognize the gravity of the district court's errors and their potential effect on all future juvenile litigants could this court have declined to grant a rehearing en banc.

I.

The defendants in this case took the unusual step of contesting plaintiffs' motion to proceed anonymously. Some history may explain why defendants fought so hard to win that contest. The Kamehameha Schools were founded in 1884 by Princess Bernice Pauahi Bishop, the last descendant of the Hawaiian monarchy, in order to preserve native Hawaiian culture and identity. *Id.* at

1039. The schools are the beneficiaries of a trust valued at over $9 billion. The Board of Trustees has interpreted the terms of the trust to require the admission of native Hawaiians, to the almost complete exclusion of non-natives. Two years before the initiation of this litigation, the schools had prevailed in a similar suit challenging their admissions policies; in that suit they made no objection to the plaintiff's anonymity. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc) ("*Doe I*"). When the school prevailed before our en banc court by a vote of 8-7 (and I was a member of the majority), *id.*, the Doe plaintiff filed a petition for a writ of certiorari. The case settled before the Supreme Court could act, however, at a sum reported in the media to be $7 million. *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 550 U.S. 931 (2007); Jim Dooley, *Kamehameha Schools Settled Lawsuit for $7m*, HONOLULU ADVERTISER, Feb. 8, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Feb/08/ln/hawaii802080371.html.

Both Kamehameha suits unfolded in a racially charged atmosphere. In recent years, Hawaii has endured a spate of anti-Caucasian violence. Students, in particular, have been the victims. The last school day in Hawaiian schools, for example, has long been known as "Kill Haole Day," with white students—"Haoles"—targeted for harassment and physical abuse.[1] In 2008, the U.S. Department of Education's Office of Civil Rights concluded an investigation of the systematic bullying of

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[1] Craig Gima, "Kill Haole Day" Linked to Hate-Crime Bill, Honolulu Star-Bulletin, Mar. 24, 1999; *see also* Larry Keller, *Prejudice in Paradise: Hawaii Has a Racism Problem*, S. POVERTY LAW CENTER INTEL. REP., Fall 2009.

non-native students in Hawaiian schools by requiring the Hawaiian Department of Education to implement over two dozen corrective actions.[2] Intimations of such violence were a feature of the first Kamehameha suit, in which there were calls to "break [the plaintiff's and his attorney's] every bone and make [those] bastards suffer," predictions that "now the boy will have to pay," and suggestions that the identities of the plaintiff and his mother should be exposed to force them to "stand up and face those that they are robbing." *Doe*, 596 F.3d 1036, 1040 (9th Cir. 2010). Around the time of the first Kamehameha case, the U.S. Attorney for Hawaii noted a "growing sense of anger and rage" prompting him to warn the public that violence based on race is a federal offense. *Id.*

Although in the first Kamehameha case the schools did not object to the plaintiff's desire to proceed anonymously—and even entered into a stipulation allowing him to do so—this time they vigorously objected to plaintiffs' request for Doe status. Plaintiffs then filed in the district court a motion for leave to proceed anonymously, which included declarations that, in light of the charged atmosphere surrounding their suit, plaintiffs would "almost certainly" allow their actions to be dismissed, with prejudice, if they were denied the opportunity to proceed without publicly disclosing their identities. When the district judge denied leave to proceed as Does, the plaintiffs allowed their suit to be dismissed with leave to appeal. *Doe*, 596 F.3d at 1038. While we can only speculate as to the defendants' motivation for objecting to anonymous proceedings, in light of the outcome of the

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[2] Rod Thompson, School Discrimination Probe Results in Deal, HONOLULU STAR-BULLETIN, Jan. 16, 2009.

first Kamehameha case one might presume that they were willing to use any permissible tactics to avoid a second trial over the legality of the schools' admissions policy.

II.

Under Federal Rule of Civil Procedure 5.2(a), adopted in 2007, "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains . . . the name of an individual known to be a minor . . . a party or nonparty making the filing may include only . . . the minor's initials . . . ." Fed. R. Civ. P. 5.2(a).[3] Neither the magistrate judge nor the district judge, even mentioned, let alone considered, Rule 5.2(a) when denying the plaintiffs' request for anonymity; nor did the panel when it reviewed the denial. Instead, they all relied exclusively on the five-factor balancing test we set forth in a case pertaining to adult litigants, *Does I Thru XXIII v. Advanced Textile*, 214 F.3d 1058, 1068 (9th Cir. 2000), a test that is inconsistent with the congressionally prescribed Rule of Civil Procedure that governs the rights of minors to anonymity. The failure to consider the relevant federal rule, a rule that establishes a special approach and procedure for granting juvenile anonymity during litigation, is in itself a legal error and abuse of discretion.

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[3] Although Rule 5.2 speaks in terms of the use of initials, the purpose is to ensure anonymity in the same manner as is ensured by the use of the term "Doe." Too many Does make it difficult for lawyers and judges to identify specific cases, keep track of which is which, and locate precedent. The district court could have required the use of initials instead of Does, unless such use would have led to a breach of anonymity given the nature of the dispute and its history.

In applying the *Advanced Textile* test, the panel (like the magistrate judge and the district judge before it) relied heavily on the concept of the general public interest in open courts in concluding that the juvenile litigants were properly denied anonymity. *See, e.g., Doe*, 596 F.3d at 1042-43.[4] Congress's ratification of Rule 5.2(a), however, makes clear its judgment that the interest of minors in privacy is greater than the public's interest in learning their names, even when there is no particular threat to the juvenile's physical safety or well-being. Unlike the view endorsed by the panel, the Federal Rules of Civil Procedure reflect a public policy of protecting juveniles from the harm that can befall them as a result of disclosing their identities in the course of litigation. The reason underlying that policy is dramatically illus-

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[4] The panel purported to affirm on the basis of prejudice to the defendant schools, as well. *Id.* at 1042 ("[T]he district court did not unreasonably conclude that the public interest and possible prejudice to the defendants outweigh the plaintiffs' interest in anonymity."). Nonetheless, this part of the panel's affirmation rested almost entirely on its assessment of the public interest, as the panel's discussion of prejudice purported to affirm the district court solely on the basis of reasons that the district judge did not offer and that the magistrate judge rejected outright. *Compare Doe*, 596 F.3d at 1045 n.7 ("[T]he district court did not abuse its discretion by finding that defendants would have been hindered in their efforts to gather third-party discovery concerning standing and in defending the high-profile case in the media, if not in the courts."), *with* Order Denying Plaintiffs' Motion for Leave to Proceed Anonymously and for Related Protective Order, *Doe v. Kamehameha Schools*, Civ. No. 08-00359, at 15 (D. Haw. Oct. 28, 2008) (rejecting defendant's arguments that third-party discovery and defendant's efforts to conduct a public media campaign would be prejudiced by anonymity).

trated in this case, in which the unidentified juvenile litigants had already been subjected to "undoubtedly severe" threats of physical violence by the time they submitted their request for anonymity. The principal basis for the panel's holding in this case—that the public for some reason has an interest in learning the identities of youthful civil rights litigants—is thus contrary to the policy that motivated Congress in ratifying Rule of Civil Procedure 5.2(a).

Rule 5.2(a) similarly exposes as contrary to federal policy the panel's holding that, in order to proceed anonymously in district courts, the juvenile plaintiffs "must show both (1) a fear of severe harm, *and* (2) that the fear of severe harm is reasonable." *Doe*, 596 F.3d at 1043.[5] Rule 5.2(a) contemplates no such showing, and the panel's threshold test thus directly conflicts with the policy Congress endorsed in providing for juvenile anonymity as the general practice in federal courts. By the same token, Rule 5.2(a) highlights the speciousness of the panel's suggestion that anonymity would be inappropriate because defendants "would have been hindered . . . in defending the high-profile case in the media." *Id.* at 1045 n.7.[6] It is not clear how a litigant's desire to wage an extra-judicial media campaign could ever appropriately influence a trial judge's ruling with respect to the rights of an opposing party. But the notion that the youthful plaintiffs should be stripped of their anonymity because the defendants would be prejudiced

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[5] See *infra*, Part VI, for more detailed discussion of the novel threshold test that the panel adopted in this case.

[6] Interestingly, although the panel affirmed the district judge on this basis, it is not, in fact, an argument that either the district judge or the magistrate judge made. *See supra*, note 4.

in their media campaign is especially inappropriate in light of Congress's judgment, reflected in Rule 5.2(a), that juvenile litigants as a general rule are entitled to anonymity throughout the course of federal litigation.

While the panel's untenable analysis of the public interest and the other factors on which it relied has led to an unprecedented and unjust result in this case, such a result will likely not recur in the future, at least not in the case of juvenile litigants. Counsel in this case were either not aware of Rule 5.2(a), or for some reason did not inform either the district court or the court of appeals of its existence, thereby allowing both courts to issue opinions that seriously misstate the law, and to reach their decisions without considering the most pertinent federal rule. It is astonishing that there was not a single counsel on either side who was aware of the rule and felt an obligation to bring it to the district court's and our court's attention.

In the future, should a minor plaintiff seek to file a lawsuit without disclosing his identity, the district court should not look to the opinion the panel has issued here but to Rule 5.2(a) of the Federal Rules of Civil Procedure. When doing so, the district court will undoubtedly recognize that the rule reflects a policy judgment that little if any public interest lies in learning the identity of youthful litigants while a strong public interest exists in protecting their identities. The court will then undoubtedly not repeat the panel's mistaken analysis of the public interest. It will also undoubtedly recognize that in order to proceed anonymously in federal court, minors need not establish a reasonable fear that serious threats made against them will be carried out, or even that any threats against them have been made. Thus, this troubling opinion will, fortunately, be of little con-

sequence and no precedential value in the case of minor litigants, nor will *Advanced Textile*, which all the judges concerned purported to follow.

To be clear, the panel's decision should have been taken en banc and reversed for any number of reasons. First, the panel failed to consider the Federal Rule of Civil Procedure that governs the right of juveniles to file suits without disclosing their identities. Second, the policy underlying that rule makes clear that the reasons advanced by the magistrate judge and the district judge, and affirmed by the panel, for requiring the juveniles to disclose their identities publicly if they wished to pursue this litigation are without merit. Third, even without considering the Rule, it is clear that the denial of anonymity to the young plaintiffs was arbitrary, unreasonable and contrary to uniform practice throughout the nation. Fourth, the panel's ruling is inconsistent with Ninth Circuit precedent. I will discuss the last two points below. The fourth point is of the most practical significance for, as I have explained, while this opinion will have no future force or effect with respect to juvenile litigants, it constitutes the law of the circuit with respect to adult litigants seeking anonymity.

III.

Rule 5.2(a) took effect on December 1, 2007, almost a year before the district court's decision and less than three years prior to the panel's. However, even before the adoption of the Rule, the American legal system had treated juveniles seeking Doe status favorably and with solicitude. Indeed, no prior appellate court has ever in a published decision refused to allow minors to employ Doe status. *See, e.g., Doe v. Blue Cross & Blue Shield United of Wisc.*, 112 F.3d 869, 872 (7th Cir. 1997) ("[F]ic-

titious names are allowed when necessary to protect the privacy of children, rape victims, and other particularly vulnerable parties or witnesses."); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) ("The gravity of the danger posed by the threats of retaliation against the Does for filing this lawsuit must also be assessed in light of the special vulnerability of these child-plaintiffs."). Not only has the panel here distinguished itself as the first appellate tribunal to deny anonymity to juvenile litigants, but it has attained that distinction by being the first to do so in the case of young students seeking to assert their civil rights in an atmosphere of racial tension.

It is difficult to comprehend why the panel felt compelled to hold that young students filing a civil rights suit in order to attend a school from which they were excluded on account of their race or ancestry may be denied the right to file their federal suit anonymously. It is even more difficult to understand why the panel felt compelled to do so on the ground that the minor plaintiffs' fear of the violent internet threats made against them may have been "unreasonable." Why is it necessary that their fear of the "severe threats" have been "reasonable," let alone that there have been any "severe threats" at all? American courts routinely grant juvenile plaintiffs anonymity in matters less serious than this.[7] *See, e.g., Heather K. by Anita K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1255-56 (N.D. Iowa 1995) (granting anonymity to child with severe cardiac and respiratory conditions bringing suit against city under

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[7] A Westlaw search for school-related suits under the Individuals with Disabilities in Education Law, for example, reveals hundreds of district court cases in which minor litigants are identified by their initials or as Does.

ADA, based upon concerns for privacy and possibility of harassment); *Moe v. Dinkins*, 533 F. Supp 623, 627 (S.D.N.Y. 1981) (allowing anonymity to plaintiffs challenging law requiring parental consent for minors to marry). Moreover, the notion that juveniles' identities are protected during litigation is reflected not only in Rule 5.2(a) and an unbroken line of federal cases, but also in state statutes regarding anonymous adoption and juvenile criminal proceedings. *See, e.g.*, HAW. REV. STAT. § 578-15 (requiring secrecy of adoption proceedings); HAW. REV. STAT. § 576B-312 (requiring nondisclosure of child's name in child support proceedings); HAW. REV. STAT. § 846D-4 (limiting dissemination of juvenile criminal information).

The rule allowing minors to protect their identity is especially important when their suits involve controversial or unpopular causes. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 & n.1 (2000) (approvingly discussing district court's decision to grant plaintiffs anonymity in Establishment Clause challenge); *Stegall*, 653 F.2d at 186 (5th Cir. 1981) (emphasizing vulnerability of youthful plaintiffs in reversing district court's denial of anonymity for Establishment Clause challenge); *Doe v. Harlan Cnty. Sch. Dist.*, 96 F. Supp. 2d 667, 670-71 (E.D. Ky. 2000) (granting juvenile plaintiffs anonymity in Establishment Clause challenge to religious displays in schools). In the most recent case, a challenge to the use of the term "under God" in the Pledge of Allegiance, there were two Doe, one "Doechild," one Poe, one "Poechild," one Roe, and two "Roechild" plaintiffs. *See Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (2010); *see id.* at 1095-98 (Reinhardt, J., dissenting) (discussing the particular susceptibility of schoolchildren to coercion to conform to majority views "rather than label

[oneself] an oddball, a troublemaker, and an outcast, [or] subject [oneself] to humiliating name calling, harassment and derision"). Finally, in the first *Kamehameha* case, no challenge was made to the rights of the would-be schoolchildren to litigate their civil rights claims as Does. The suit brought by plaintiffs here falls squarely within this tradition, although unlike in the other cases, the plaintiffs who sought anonymity here had already been the objects of threats of violence and severe harm.

The panel's decision, which places a significant burden on young civil rights litigants bringing suit in a racially charged environment, is contrary to our traditional recognition of the vulnerability of minor litigants, to the universal practice of the American court system, to the rule in other circuits, and to fundamental notions of fairness and justice. Were it followed, it would have the effect of endangering juveniles' safety or alternatively closing courthouse doors to youthful civil rights litigants, and in either event of making the pursuit of lawsuits alleging racial discrimination even more difficult than at present. In the end, the panel simply erects one more procedural obstacle in the ever-increasing effort to prevent individuals from presenting the merits of their cases in federal courts.

IV.

The district court's decision was, even on its own terms, a clear abuse of discretion. In holding otherwise, the panel opinion allows district judges to rely on a number of harmful propositions. Despite expressing serious skepticism about the district judge's reasoning at every turn, the panel affirms by repeatedly invoking the deference due to a trial judge under the abuse of discretion standard of review. *Id.* at 1046. However, when, as here,

a trial judge is wrong about *everything*, surely that is an abuse of his discretion. To list but a few of the clearly erroneous notions that gain force by reason of our extravagant deference: plaintiffs may be unreasonable in fearing severe threats of physical retaliation because they are made via the internet; litigants do not reasonably fear threats of serious harm when they are made by unidentified people, some of whom may not intend to carry them out; plaintiffs may be unreasonable in fearing threats because they are countered by calls for nonviolence (a fact that would seem actually to highlight the seriousness of the threats); and the truly inappropriate notion that impairment of a defendant's ability to "defend[ ] the high-profile case in the media" constitutes legal prejudice sufficient to defeat a request for Doe status by young plaintiffs who have been threatened with serious injury.[8] Abuse of discretion surely has limits. Discretion does not include the right to be wrong about everything.

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[8] Notably, the district judge never held that the defendant schools in this case would be prejudiced by an inability to wage a full campaign in the media, and the magistrate judge explicitly rejected that argument. *See supra* note 4. Thus, in our haste to extend deference to the trial judge, we have affirmed him (and given life to a troubling legal principle) on the basis of arguments that he did not even make and which the magistrate judge rejected outright. The damage caused by our eager, uncritical deference in this case will almost certainly extend well beyond the parties before us, giving district judges in future cases broad and unreviewable license to deny Doe status for the most insubstantial of reasons, or for no reason at all.

V.

En banc review was further necessary in this case to determine whether the five-part *Advanced Textile* balancing test we adopted in a case about the threatened deportation of adult factory workers is the appropriate test for all litigants seeking Doe status. Clearly, as we have already seen, it is not the appropriate test for juveniles. Five part or seven part or other multi-part tests are often subject to subjective and inconsistent application. There may be some advantage to such flexibility in our application of certain rules. In other instances it makes appellate review extremely difficult, and precedent of little value. When multi-factor tests are combined with double deference review in a case such as this, there is considerable reason for concern. Here, for example, after the magistrate judge denied the plaintiffs' request for Doe status, the district judge purported to review that decision solely to determine whether it was "clearly erroneous or contrary to law." *See Doe*, 596 F.3d at 1041 n.4 (applying 28 U.S.C. 636(b)(1)(A)). The panel, in turn, purported to review the district judge's decision solely for abuse of discretion. This double deference in itself may frequently leave lower courts as well as ours in a state of confusion. Here, for example, the panel directly deferred to what the magistrate judge concluded in some instances, to what the district judge found in others, and on some occasions to what neither actually concluded.[9] This is considerably different from

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[9] For instance, the panel treated the district and magistrate judges' orders applying the *Advanced Textile* test as interchangeable, and was clearly confused by the task of identifying the precise conclusions that were before it for review. For example, on the issue of prejudice the panel held that,

(continued...)

the standards we purport to follow: review for abuse of discretion the district court's decision as to whether the magistrate's judgment was clearly erroneous or contrary to law. The difference between theory and practice regarding what decision the court of appeals should review, and under what standard we should do so, necessitates further examination. But given that such confusing double deference is presently the law of our circuit, I can only observe that the use of a highly subjective five-factor test may render the lower court's decision effectively unreviewable. As this case demonstrates, when the subject of review is a malleable five-part balancing

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[9] (...continued)
the "district court did not abuse its discretion by finding that defendants would have been hindered in their efforts to gather third-party discovery concerning standing and in defending the high-profile case in the media, if not in the courts." *Doe*, 596 F.3d at 1045 n.7. However, the district judge made no such finding—in fact, he was utterly silent on the issue of prejudice. And the magistrate judge rejected these arguments explicitly. *See* Order Denying Plaintiffs' Motion for Leave to Proceed Anonymously and For Related Protective Order, *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, at 15 (finding defendants "will not be prejudiced by Plaintiffs' portrayal in the media"); *id.* at 16 ("[I]t remains speculative whether anonymity will burden any third party discovery."). Further, even had it not been rejected by the magistrate judge, difficulty "defending the high-profile case in the media," surely is not a legitimate factor for a judge to consider in deciding whether to grant anonymity. That the panel affirmed the district judge on the basis of arguments that he did not make—indeed, arguments that the magistrate judge rejected outright—makes clear that such double deference generates undue complexity on review, and ought to be reconsidered by an en banc court.

test, district judges may hesitate to label even very troubling magistrate judge decisions "clearly erroneous," and this court, in turn, may hesitate to reverse the district court's decision when compelled to apply an "abuse of discretion" standard. The result: "no meaningful review."

I have little doubt that the unjust and unsupportable decision that the panel reached in this case, and likely the decision that our court made not to go en banc, are a result in large part of our double deference to a magistrate judge's decision applying a highly subjective and malleable five-part test. Such convoluted deference amounts, as it did here, to an abdication, rather than an exercise, of Article III review. It is unfortunate that the result is a decision by this court that is manifestly at odds with the long-standing practice of the federal courts and a forfeiture of the rights of would-be students to enforce their Constitutional claims in federal court.

VI.

While the panel decision will in the future be of little or no consequence with respect to the rights of juveniles to anonymity, read literally it would have a substantial effect on our rules governing anonymity for adults. The panel purports to follow the five-factor test we established for Doe status in *Advanced Textile*, which calls on us to balance: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation;" as well as (4) "the precise prejudice at each stage of the proceedings to the opposing party, and whether proceedings may be structured so as to mitigate that prejudice;" and (5) "whether the public's interest in the case would be best served by requiring that the litigants reveal their identities." 214 F.3d at 1068-69 (ci-

tations omitted). However, without any discussion or explanation, the panel changed the *Advanced Textile* rule, and imposed upon litigants for the first time a disqualifying threshold showing: *"In order to proceed anonymously*, a plaintiff *must* show *both* (1) a fear of *severe* harm, *and* (2) that the fear of *severe* harm is reasonable." *Doe*, 596 F.3d at 1043 (emphasis of "and" in original). It is difficult to believe that the panel intended that change, for if it did, one would have thought it would have announced that it was modifying the test instead of stating that it was simply applying the existing rule.

The panel's requirement of reasonable fear of *severe* harm as a *sine qua non* for allowing plaintiffs to seek Doe status is contrary to the *Advanced Textile* test. That test sought to balance the "party's need for anonymity [against] prejudice to the opposing party and the public's interest in knowing the party's identity." *Advanced Textile*, 214 F.3d at 1068. It made clear that, along with "the reasonableness of the anonymous party's fears" and "the anonymous party's vulnerability to . . . retaliation," the severity of the feared harm was but one of three factors to be considered in support of anonymity, and the degree of severity was just that: a question of degree. *Id. Advanced Textile* did not identify any of the three factors supporting anonymity as an absolute prerequisite, and the balancing test did not require that a fear of *severe* harm be shown at all if the other factors supporting anonymity were sufficient to outweigh prejudice to the opposing party and the public's interest in disclosure of the litigant's identity. By making a reasonable fear of *severe* harm an absolute threshold requirement for a grant of Doe status, the panel leaves the law in a state of confusion, creating a clear conflict between the *Advanced Textile* test that it purported to apply and the

test that it actually applied. It also empowers magistrate and district judges to deny adult litigants anonymity on the basis of the most pretextual countervailing concerns, or in some instances, without any countervailing concerns at all.

VII.

It is fortunate that, due to the existence of Rule 5.2(a), and the panel's failure to consider that rule, the opinion this court has declined to hear en banc, and its predecessor *Advanced Textile*, will have no effect on future juvenile litigants. But for that, it would impose on minors an onerous burden that few of them could meet. Still, the future inapplicability to juveniles is of little solace to the plaintiffs in this case, or to adult litigants who may in the future be deserving of anonymity but may be denied it due to the many harmful propositions that this opinion affirms, including the introduction of the unprecedented threshold test for Doe status. Perhaps in one respect, however, future adult litigants will be fortunate in at least some cases. Perhaps, upon further reflection, we will be more willing to reverse when a district judge abuses his discretion. The abuse of discretion standard is deferential; but when, as here, a district judge clearly abuses that discretion, future panels may not be as neglectful of their duty to recognize that abuse and to undertake meaningful review. In such cases at least, the amorphous "abuse of discretion" standard which serves the judicial system well as an abstract proposition will be applied in a manner that truly implements the purposes and objectives which it was intended to serve.

I dissent.

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Response to Concurrence in the Order

Having reviewed this dissent and finally awakened to the relevance of Rule 5.2(a), the panel defends its position, first by suggesting that the Rule was not designed to provide anonymity for minors, but rather only "veiled identification." *See Concurrence from Denial of Rehearing En Banc* at [92a]. The panel should be embarrassed to make this argument. Either the rule is designed to protect the identity of minors or it is not. The answer is clearly the former, although where it may not fully serve that purpose Doe status remains available. What the rule makes clear in any event is that the identity of juveniles should be protected by the courts under most circumstances.[10]

The panel also speculates, with no proof in the record, that plaintiffs did not invoke Rule 5.2(a) because they would turn 18 before the litigation ended. *Id.* It is unlikely, however, that plaintiffs filing a suit seeking

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[10] The majority appears to believe that the rule's purpose will be satisfied even if some of the young plaintiffs' initials are sufficiently uncommon that their identities will be discernible, while the identities of other young plaintiffs in the same suit will not be revealed because there are a fair number of minors who have those same initials.

The majority's assertion that the plaintiffs' initials "will effectively reveal their identities" is equally nonsensical. Aside from rendering the rule without purpose, the assertion is wholly incorrect factually. There are more than 50,000 non-native, high-school-age children in Hawaii, *see* Office of Hawaiian Affairs, Native Hawaiian Data Book 56 (2006), so revealing the plaintiffs' initials will not, as the panel claims, "effectively reveal their identities," except in the most unusual circumstances. *Concurrence to Denial of Rehearing En Banc* at [92a].

admission to high school were old enough to have almost graduated from school. *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656-57 (9th Cir. 2002) (students do not have standing to sue a school that they cannot apply to in the future). In a futile attempt to refute this argument, the panel's concurrence would make new law by declaring *ex cathedra* that Rule 5.2(a)'s protections end the moment a plaintiff turns 18. *Concurrence to Denial of Rehearing En Banc* at [92a]. The panel has no support for this gratuitous pronouncement, which is probably wrong. After all, we do not publicly release juvenile records once a minor offender becomes an adult, *see, e.g.*, 18 U.S.C. § 5038(a), and nothing in Rule 5.2(a) indicates that the rule should be any different for court filings made by a minor.

The panel also cites to a litany of cases involving individuals over the age of 18, or cases from long before the adoption of Rule 5.2(a) or the use of Does in general, to support the proposition that the most important civil rights cases involving juveniles, especially in the fields of education and Hawaiian entitlements, the minors used their real names.[11] *See id.* at [93a-95a]. It does so in an attempt to show that juvenile litigants including those in this case need have no concern about divulging their identities. Congress clearly did not agree with this view

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[11] Of the numerous cases the panel cites, only two, *Lee v. Weisman*, 505 U.S. 577 (1992), and *Mohica-Cummings v. Kamehameha Sch. / Bernice Pauahi Bishop Estate*, No. 03-cv-00441 (D. Haw. dismissed 2003), involved minor litigants bringing suit in the post-1970s era, when courts have liberally allowed litigants to use Doe status. *See* Wendy M. Rosenberger, Note, *Anonymity in Civil Litigation: The "Doe" Plaintiff*, 57 Notre Dame L. Rev. 580, 580 (1982).

when it adopted Rule 5.2(a), nor is the panel's view remotely consistent with the facts of this case.

Finally, the panel assumes that had the district judge been aware that minors are afforded special protection by Rule 5.2(a), he should have still required the plaintiffs to divulge their identities under the clause allowing the district judge to make an exception to the Rule. *Id.* at [92a]. But unless Congress's desire to ensure privacy for juvenile litigants is without any meaning, the panel cannot assume that the district judge would have made such an exception after learning about the existence of the Rule. At the very least, the panel would be required to remand the question to the district court so that it could decide whether to do so after considering the Rule, with its provision of anonymity to juvenile litigants.

I dissent.

BEEZER, GRABER, and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

We believe that the panel's unanimous decision affirming the district court was sufficient, in its own right, to justify denying a rehearing en banc. However, we write separately, concurring in that denial, to respond to the dissent to the denial of rehearing en banc.

I

The dissent argues that we erred by failing to consider Federal Rule of Civil Procedure 5.2(a). Dissent at [76a-78a]. Rule 5.2 is entitled "Privacy Protection for Filings Made with the Court" and subsection (a) states the following:

> Redacted Filings. *Unless the court orders otherwise*, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, *the name of an individual known to be a minor*, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
>
> (2) the year of the individual's birth;
>
> (3) *the minor's initials*; and
>
> (4) the last four digits of the financial-account number.

Fed. R. Civ. P. 5.2(a) (emphasis added).

The dissent correctly states that "[n]either the magistrate judge, nor the district judge, even mentioned, let alone considered, Rule 5.2(a) when denying the plaintiffs' request for anonymity; nor did the panel when reviewing the denial." Dissent at [74a]. We point out, first, that neither party brought it up before the magistrate judge, the district judge, or in their respective briefs before this court. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007) (holding that arguments not raised before the district court generally are waived); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (holding that arguments not raised in a party's opening brief generally are waived).

Second, a plain reading of the text reveals why the plaintiffs may have chosen not to invoke this rule. Rule 5.2(a) permits minors to proceed with their initials, not as "Doe" or otherwise anonymously. There are only so

many potential litigants in this suit; to reveal their initials might, for many, effectively reveal their identities. Therefore, the only relief that Rule 5.2(a) could have provided to the plaintiffs apparently did not interest them. The plaintiffs sought anonymity, not veiled identification.

Additionally, it is possible that some of the plaintiffs were 16 or 17 years old, meaning that they would have turned 18 years old before the litigation concluded. Because Rule 5.2(a) would not have protected them after their 18th birthdays, this may be another reason why the plaintiffs did not invoke the rule.

If the plaintiffs had made a Rule 5.2(a) claim, they may have been able to proceed with only their initials appearing. But we also note that nothing in the rule *mandates* veiled identity for minors. The statute gives the district judge discretionary power to permit the use of a minor's initials; it does not mandate a particular result. *See* Rule 5.2(a) (holding that minors "may" use their initials "[u]nless the court orders otherwise").

In either case, Rule 5.2(a) in no way undermines our opinion. On the contrary, it reinforces our belief that courts generally should remain open: Congress could have written Rule 5.2(a) to allow child litigants to proceed as Does or otherwise anonymously, but it did not.

II

Setting aside the Rule 5.2(a) argument, the dissent presents us with a rather Faustian choice between anonymity and civil rights litigation on one side, and disclosure and violence on the other. But, as the discussion below will show, this is a false choice.

To begin, the dissent asserts that disclosure in cases like these would put would-be plaintiffs' "physical and

mental well-being at risk," Dissent at [70a], thereby discouraging civil rights litigation. The panel did not take lightly the possibility that civil rights litigation may be chilled by disclosure. But the test that we apply today has been around since 2000, *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir. 2000), with no apparent effect on civil rights litigation. In fact, historically, the most important civil rights cases involving juveniles have all been cases where the plaintiffs used their real names, rather than pseudonyms. This is especially true in the context of education generally,[1] and of cases that have challenged Hawaiian entitlements par-

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[1] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (challenge to affirmative action scheme at public law school); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (challenge to affirmative action scheme at public university); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962) (challenge to racial segregation at public university).

Juvenile civil rights plaintiffs have also proceeded under their own names in the education context. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (constitutional challenge to recital of prayer at public school graduation ceremony); *Runyon v. McCrary*, 427 U.S. 160 (1976) (section 1981 challenge to whites-only admission policies of two private schools in Virginia); *Lau v. Nichols*, 414 U.S. 563 (1974) (challenge to public school system's failure to provide English language instruction to students of Chinese ancestry); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (constitutional challenge to recitation of Bible verse and prayer in public school); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (challenge to segregation in public schools); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (constitutional challenge to mandatory recital of pledge of allegiance in public school).

ticularly.[2] The history of civil rights litigation before and after the *Advanced Textile* test demonstrates that there is no risk that our decision will chill future litigation.

The dissent also believes that disclosure would place these litigants in particular at great risk. Here the dissent simply disagrees with the district judge's factual finding that the Doe children do not reasonably fear severe harm. Taking the internet postings at face value, the dissent would have us fear for the children's lives if the suit were to move forward without anonymity. But, as we explained in our opinion, a fair reading of the record reveals that the district court's factual finding was not clearly erroneous.

Consider, for instance, that in the past students have used their real names when challenging Kamehameha's admissions processes.[3] Not only that, those students

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[2] *See, e.g., Rice v. Cayetano*, 528 U.S. 495 (2000) (section 1983 challenge to Hawaiian ancestry requirement for voting for trustees of Hawaii's Office of Hawaiian Affairs); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007) (section 1983 challenge to State of Hawaii programs restricting benefits to "native Hawaiians" or "Hawaiians"); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) (section 1983 challenge to provision of Hawaii Constitution creating agencies that allocate benefits to Native Hawaiians); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (section 1983 challenge to constitutional and statutory requirements that trustees of the Office of Hawaiian Affairs be citizens of Hawaiian ancestry); *Mohica-Cummings v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, No. 03-cv-00441 (D. Haw. 2003) (juvenile plaintiff challenging Kamehameha's admission policy).

[3] *See, e.g., Mohica-Cummings v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, No. 03-cv-00441 (D. Haw. 2003) (juvenile plaintiff challenging Kamehameha's admission policy).

have since prevailed and enrolled in the school, with no incidents whatsoever, either in class or in public. *See Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1045 (9th Cir. 2010) ("*Doe II*"); *see also* SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT,& POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 45 (2006) (describing how Kamehameha's student body has changed drastically as "each generation of children had a lower quantum of Hawaiian blood"). Moreover, the district court weighed the comments regarding violence at Kamehameha against the plaintiffs' own statements that they did not fear "possible retaliation and ostracism at [Kamehameha Schools] if and when they are admitted." *Doe II*, 596 F.3d at 1040-41.

The district judge was able to review carefully all the evidence presented before concluding that "Plaintiffs continue to establish, at most, that they are vulnerable children who have a reasonable fear of social ostracization and negative press for their involvement in this case." Given the Plaintiffs' own statements and the history of nonviolence towards non-Hawaiian admitted students, we concluded that the district court did not clearly err.

III

Finally, the dissent criticizes the panel for using the five-factor test that we are compelled to apply in cases like this one. Dissent at [83a]. But often in complex cases where there are various competing concerns that must be weighed in tandem, only a multi-factor test will do. Here we must consider five elements: the severity of the threat; the reasonableness of the anonymous party's fear of that threat; any vulnerabilities peculiar to the anonymous party; the prejudice that anonymity would present to the opposing party; and the public interest.

Doe, 596 F.3d at 1042. A five-factor test is therefore necessary to ensure that each of the concerns is considered in its own right.

The dissent also alleges that we are amending the *Advanced Textile* test by requiring that a plaintiff show "both (1) a fear of severe harm, *and* (2) that the fear of severe harm is reasonable." *Id.* at 1043. But read closely, this objection is simply a repackaged objection to our decision to analyze these factors together, an approach that is both logical and pragmatic. For instance, a plaintiff may fear extraordinary harm, but such fear should not matter if it is wholly unreasonable. *See id.* at 1044. And conversely, it should not be sufficient for a plaintiff to reasonably fear any slight harm or to seek anonymity in order "to avoid the annoyance and criticism that may attend any litigation." *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). Contrary to the dissent's assertion, our approach in this regard does not conflict with *Advanced Textile*. Indeed, the requirement that a plaintiff reasonably fear sufficiently "severe" harm comes straight from the *Advanced Textile* opinion, which concludes: "We hold that where, as here, the named plaintiffs . . . demonstrate that they have *an objectively reasonable fear of extraordinarily severe retaliation*, they may conceal their identities from defendants . . . ." 214 F.3d at 1063 (emphasis added). *Advanced Textile* asks whether "'a reasonable person would believe that the threat might actually be carried out.'" *Doe*, 596 F.3d at 1044 (quoting *Advanced Textile*, 214 F.3d at 1071). Other circuits require even more. *See, e.g., Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (per curiam) (requiring "real danger of physical harm").

The dissent would boil the test down to one factor: the vulnerability of juveniles. Dissent at [79a-96a]. But treating the age of the plaintiff as an *overriding* factor

is not what our precedent requires. As we wrote, the vulnerability factor is certainly one that weighs in favor of anonymity, but it is still only one factor—not the *only* factor. *Accord Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) ("Again, we do not mean to imply that all civil rights suits mounted in the name of children may be prosecuted anonymously. Rather, we view the youth of these plaintiffs as a significant factor in the matrix of considerations arguing for anonymity here.").

Finally, we disagree that denying anonymity to child plaintiffs is "out-of-step" with the other circuits, Dissent at [71a], and the "universal practice of the American court system," Dissent at [81a]. The dissent's assertion begs the question: what is the "universal practice"? *Stegall* is the only circuit case to conclude that a district court erred in denying Doe status to child plaintiffs, and the court there went to great lengths to point out how exceptional its grant of anonymity truly was. Furthermore, that court's mention of a "universal practice" is contrary to the dissent's view: "We conclude that the *almost universal practice of disclosure* must give way in this case to the privacy interests at stake." *Stegall*, 653 F.2d at 186 (emphasis added).

Motions to proceed anonymously have been litigated rarely, especially at the appellate level. This is the first published Ninth Circuit case to reach the question of a plaintiff's motion to proceed anonymously since *Advanced Textile* was decided ten years ago.[4] Far from providing

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[4] There were two unpublished decisions. *See Fernandez v. Nevada*, 361 F. App'x 859, 859 (9th Cir. 2010) (holding the district court did not abuse its discretion in denying anonymity); *Doe v. Bergstrom*, 315 F. App'x 656, 656-57 (9th Cir. 2009) (same).

support to the dissent's argument, its citations to case law and statutes merely show that some child plaintiffs have been granted Doe status, some legislation provides for Doe status, and some district courts have used their discretion to grant Doe status. But overall it is clear that there remains a presumption against anonymity.

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Supreme Court, U.S.
FILED
APR 8 - 2011

No. 10-1100

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JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.,
Petitioners,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP ESTATE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the court of appeals properly upheld the exercise of discretion by a district court, sitting in Honolulu and familiar with the local community, to deny Petitioners' motion to proceed anonymously in their challenge to Respondents' Native Hawaiian admissions policy, where their alleged fear of reprisal was based upon a handful of anonymous Internet comments and news stories unrelated to Respondents or this case.

RULE 29.6 STATEMENT

Kamehameha Schools/Bernice Pauahi Bishop Estate is a private, charitable, not-for-profit educational institution. Accordingly, it has no parent company and no stockholders.

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JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kamehameha Schools/Bernice Pauahi Bishop Estate, and Nainoa Thompson, Diane J. Plotts, Corbett A. K. Kalama, Robert K. U. Kihune, and J. Douglas Ing, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate (hereinafter collectively "KS"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT

In the decision below, a unanimous panel of the Court of Appeals for the Ninth Circuit held that the district court did not abuse its discretion or make

clearly erroneous factual findings when it denied Petitioners' motion to proceed anonymously. This narrow and fact-bound decision has little applicability beyond this case, and does not conflict with any decision of this Court or present any important question that warrants this Court's attention. Nor is this one of the rare decisions properly reviewed under this Court's "supervisory power," as it does not involve any departure from proper judicial administration. To the contrary, the decision reflects standard application of abuse-of-discretion review and proper deference to a magistrate judge and a district judge who were both intimately familiar with the local community and who thoroughly considered and rejected, over the course of three lengthy written opinions, Petitioners' asserted grounds for anonymity. The petition should be denied.

1. "The Kamehameha Schools were created under a charitable testamentary trust established by the last direct descendent of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 831 (9th Cir. 2006) (*en banc*) ("*Doe I*") (internal quotation marks omitted). To carry out its mission of improving the capability and well-being of Native Hawaiians through education, KS applies an admissions policy that gives a preference to Native Hawaiians in many of its educational programs. 1 S.E.R. 118. Contrary to Petitioners' assertion (Pet. 3), however, this preference does not operate as an absolute exclusion of non-Native Hawaiians. In fact, when places are available, non-Native Hawaiians are

admitted, and a non-Native Hawaiian student was admitted without incident during the current school year.[1]

In *Doe I*, the Ninth Circuit, sitting *en banc*, upheld KS's admissions policy against a challenge brought under 42 U.S.C. § 1981 by plaintiffs who were represented by Petitioners' lead counsel in the current action, Eric Grant. That case settled while a petition for a writ of certiorari was pending in this Court. *See* Pet. App. 5a. This case arises from Petitioners' stated ambition to overturn *Doe I*. 2 E.R. 299.

While KS acceded to the plaintiffs' request for anonymity in *Doe I*, it declined to do so in the current case. In the interim between the initiation of *Doe I* and the current case, KS had had successful experiences with the admission of non-Native Hawaiian students to its campuses, and thus saw no basis for Petitioners' asserted fears of retaliation and reprisal. In particular, KS had successfully enrolled non-Native Hawaiian students Kalani Rosell (1 S.E.R. 80-82) and Brayden Mohica-Cummings, who was admitted after suing in his own name, again represented by Mr. Grant (1 S.E.R. 83-85). Both students were welcomed at KS, and suffered no threatened or actual harm despite the public controversy surrounding their admission. Mr. Grant himself stated in a televised interview that Mohica-Cummings was "doing great, he's enjoying himself, he's made a lot of friends and is fitting right in." 1 S.E.R. 86. And, in an interview shortly before his graduation in 2007, Mr. Rosell described the "close feeling of *ohana*, of family"

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[1] *See, e.g.*, *Kamehameha Admits Non-Native Hawaiian*, MAUI NEWS (July 10, 2010), *available at* http://www.mauinews.com/page/content.detail/id/533273.html?nav=5031 (last visited Apr. 5, 2011).

at the school, where "[e]very teacher is like a parent or relative, and each student is like a brother or sister." 1 S.E.R. 82.

In declining to consent to Petitioners' request to proceed anonymously in this case, KS was also motivated by the need for discovery in order to challenge Petitioners' standing, as it would be hampered in pursuing third-party discovery from teachers and academic staff if it was unable to reveal Petitioners' identities. Finally, KS was aware of a host of other challenges to Native Hawaiian programs that plaintiffs all had pursued in the district court in Hawai`i under their real names without any actual or threatened harm. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002).

2. The minor Petitioners applied for admission to KS's K-12 campus program for the 2008-09 school year, but none was admitted. 2 E.R. 300. In August 2008, Petitioners filed a complaint alleging that KS's admissions policy violates Section 1981. 2 E.R. 298-306.

Petitioners moved to proceed anonymously. They specifically denied any fear of "possible retaliation and ostracism at KS" by students, faculty, or staff. 1 S.E.R. 32c n.2. Instead, they contended that disclosing their identities would lead to retaliation by the public, based on a few anonymous Internet comments that their counsel culled from various newspapers' websites (2 E.R. 242-85), news articles about Rosell and Mohica-Cummings (2 E.R. 218-23), and news articles about a few hate crimes in Hawai`i wholly

unrelated to KS, its admissions policy, or this case (2 E.R. 224-36).

In support of their motion, three of the adult Petitioners also submitted affidavits. 2 E.R. 286-97. In the affidavits, each virtually a verbatim copy of the other, the parents stated their belief that their children would be "subjected to retaliation and harassment" and "serious risk of physical attacks" and were "very likely to be socially ostracized" if their identities were revealed. 2 E.R. 288, 292, 296. They based these fears solely upon unspecified media reports and comments about Native Hawaiian issues, as well as their awareness "of many rallies and marches, some involving thousands of people, in support of Kamehameha's admissions policy." 2 E.R. 288, 292, 296.[2]

3. The magistrate judge denied Petitioners' motion to proceed anonymously in a comprehensive, 22-page opinion addressing each factor that the Ninth Circuit set forth in that Circuit's leading case on plaintiff anonymity, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).[3] With respect to

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[2] Petitioners also offered a conclusory declaration from the *Doe I* parent/plaintiff stating that, in light of the disclosure in the media of the substantial monetary settlement she received in *Doe I*, she would fear for her safety if her identity were disclosed. 2 E.R. 238-41. She based this purported fear on three anonymous Internet comments (taken from 1551 comments on the *Honolulu Advertiser* website) (2 E.R. 240-41) and her unspecified "experience with many local residents" (2 E.R. 241).

[3] *Advanced Textile* instructs lower courts to evaluate the following factors when a plaintiff seeks to proceed anonymously: (1) "the severity of the threatened harm"; (2) "the reasonableness of the anonymous party's fears"; (3) "the anonymous party's vulnerability to such retaliation"; (4) "the precise prejudice at each stage of the proceedings to the opposing party"; and

the first factor, severity of harm, the magistrate judge ruled that "none of Plaintiffs' evidence shows any threat of physical violence or economic harm against Plaintiffs ...." Pet. App. 56a. Of the Internet comments Petitioners submitted, the magistrate judge found that "only four [were] conceivably made against Plaintiffs" (Pet. App. 54a) and none was an actual threat: two addressed "how Plaintiffs might be treated if they are admitted to Defendants' school" (Pet. App. 55a)—a concern Petitioners themselves had disavowed (1 S.E.R. 32c n.2)—and the other two merely "voice[d] the commentators' frustration with this lawsuit" (Pet. App. 56a (citing 2 E.R. 276, 285)).[4] The magistrate judge discounted reported public reaction against Mohica-Cummings' admission in 2002, noting that even the U.S. Attorney who urged public calm at the time (a warning one of Mohica-Cummings's own attorneys deemed "unnecessary" (1 S.E.R. 84)) was "unaware of any credible threats." Pet. App. 53a. And the magistrate judge discounted news articles about hate crimes in Hawai`i as "not connected to any of the parties in this action, nor [involving] threats against anyone challenging Defendants' admissions policy." Pet. App. 54a.

With respect to the second *Advanced Textile* factor—reasonableness of Petitioners' fears—the magistrate

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(5) "whether the public's interest in the case would be best served by requiring that the litigants reveal their identities." 214 F.3d at 1068.

[4] Petitioners now rely on just two anonymous Internet comments. Pet. 6. Both comments ("youre jus gonna get lickins everyday" and "one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians armed with baseball bats or guns") constitute mere hyperbole or wild speculation about what others might do, and the latter comment is further discredited by its baseless racial disparagement of Native Hawaiians.

judge concluded that, "without evidence of any threats of physical violence or economic harm against them, a reasonable person would not believe that Plaintiffs might be physically or financially threatened." Pet. App. 57a. As to the public-interest factor, the magistrate judge recognized that, "[a]s in other civil rights cases, the public has a strong interest in knowing who is using the courts to vindicate their rights." Pet. App. 61a. The magistrate judge also discussed the remaining *Advanced Textile* factors, concluding that only the young age of some Petitioners weighed in favor of anonymity. Pet. App. 58a-60a. The magistrate judge then balanced the factors and ruled that Petitioners had not overcome the "presumption, firmly rooted in American law, of openness in judicial proceedings." Pet. App. 63a (quoting *Doe v. Merten*, 219 F.R.D. 387, 390 (E.D. Va. 2004)).

4. Petitioners moved for reconsideration after anonymous Internet comments were posted in response to the magistrate judge's ruling and Petitioners' well-known Hawai`i counsel received an email of unknown origin and allegedly received a threatening phone call. The magistrate judge denied reconsideration in a 10-page written decision (Pet. App. 38a-46a), explaining that the new Internet comments were "of the same character and nature as the evidence [he] previously considered and [were] no more probative of a severe threat of harm or a reasonable fear of harm" (Pet. App. 43a); that none of the three anonymous Internet comments that Petitioners contended were directed toward them contained any threats (Pet. App. 43a-44a);[5] that the anonymous

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[5] Petitioners now point to five Internet comments. Pet. 7. The first, second, and fifth comments ("Good that the judge ordered them to make these little brats names known to the

email was not directed toward Petitioners (Pet. App. 45a); and that the alleged anonymous phone call to Petitioners' counsel merely "voice[d] frustration with the lawsuit but [did] not show a severe threat of harm" (*id.*). Instead, as the magistrate judge noted, "Plaintiffs' evidence confirms that, under the cloak of anonymity, people will make outrageous, offensive, and even nonsensical statements." *Id.*

5. Petitioners appealed to the district court, which affirmed in a 19-page written decision. Pet. App. 20a-37a. As to the severity of supposedly threatened harm, the district court concluded that the magistrate judge's "thorough analyses of the evidence are not clearly erroneous or contrary to law," noting that the magistrate judge "went through each type of alleged threat in detail ... and explained why the evidence did not indicate a threat of harm to Plaintiffs," including the evidence adduced after his initial decision. Pet. App. 34a-35a.

As to the reasonableness of Petitioners' fear of harm, the district court rejected Petitioners' contention that the magistrate judge had failed to view the evidence through the eyes of a reasonable person in their position. Pet. App. 35a-36a. Noting that the

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public, so they can be tormented by their fellow students and general public;" "4 kids ... will need 10 bodyguards lol;" and if their names were revealed, Petitioners "would have to watch their backs for the rest of their lives!") constitute idle speculation that has no significance in light of Petitioners' repeated concession that they have no reason to fear any harm from any student, teacher or staff member at KS. The third comment ("Sacrifice them!!!!!!!!") is nonsensical. And the fourth comment ("stringing up those scum lawyers is not such a bad idea") expressly disclaims any seriousness ("Don't be scared, it's in the Halloween spirit" (2 E.R. 123)).

magistrate judge had explicitly followed the *Advanced Textile* framework, the district court concluded that, "[g]iven the absence of threats directed to Plaintiffs, no reasonable person in *any* position would believe a threat would be carried out." Pet. App. 36a.

Having been rebuffed by two judges who were closely familiar with the community in which this dispute arose and thus were able to assess the Internet statements in context, Petitioners declined to undertake an interlocutory appeal under the collateral order doctrine, *see Advanced Textile*, 214 F.3d at 1066-67. Instead, they voluntarily dismissed their complaint with prejudice, stipulated to final judgment, and appealed that judgment to the Ninth Circuit.

6. On appeal, a unanimous panel of the Ninth Circuit (Beezer, J., joined by Graber and Fisher, JJ.) affirmed the district court's decision, noting "the paramount importance of open courts" and reiterating that "the default presumption is that the plaintiffs will use their true names." Pet. App. 18a. Applying deferential abuse-of-discretion review and stressing that "[i]t is in the particular purview of the district court to view alleged threats in context and determine what the 'reasonable' person in the plaintiffs' situation would fear," Pet. App. 15a, the panel concluded that:

> (a) "[t]he magistrate judge correctly recognized that many times people say things anonymously on the internet that they would never say in another context and have no intention of carrying out" (Pet. App. 16a);

(b) "[t]he magistrate judge noted that plaintiffs had culled only a few comments out of hundreds of anonymous comments regarding this case" (Pet. App. 16a-17a);

(c) the district court "correctly evaluated [Petitioners'] concession 'that they are not fearful of retaliation and ostracism at [KS] if and when they are admitted' in discounting the threats that the children would get 'lickins' everyday at school" (Pet. App. 17a);

(d) "Rosell and Mohica-Cummings both attended [KS] with no reported incidents—either at school or outside the school setting" (Pet. App. 17a); and

(e) "Mohica-Cummings used his real name in litigation against [KS], and his counsel specifically stated that the U.S. Attorney's warnings to the public were unnecessary" (Pet. App. 17a).

The panel also held that the district court did not abuse its discretion in concluding that the public-interest factor did not favor anonymity, "[g]iven the strong general presumption that plaintiffs will conduct litigation under their own names." Pet. App. 13a. And the panel concluded that the remaining factors—plaintiffs' vulnerability and prejudice to defendants—did not tip the balance toward anonymity. Pet. App. 17a-18a.

7. Petitioners then filed a petition for rehearing *en banc*. The petition was denied over two dissents. One dissenter, Chief Judge Kozinski, disregarded the magistrate judge's and the district judge's factual findings and would have permitted Petitioners to proceed anonymously based on his view that the anonymous comments made on the Internet and to Petitioners' counsel constituted "threats" that "suggest[ed] or

urge[d] physical violence on account of the lawsuit." Pet. App. 67a-68a. In light of the denial of rehearing *en banc*, however, Chief Judge Kozinski urged Petitioners to seek "to set aside the dismissal of their claims, perhaps under Fed. R. Civ. P. 60(b), so they can file a complaint that complies with Fed. R. Civ. P. 5.2(a)." Pet. App. 68a.[6]

The second dissenter, Judge Reinhardt, was influenced by his view, unsupported by the record, that this case "unfolded in a racially charged atmosphere." Pet. App. 72a. He understood Congress's ratification of Rule 5.2(a) as an expression of "its judgment that the interest of minors in privacy is greater than the public's interest in learning their names, even when there is no particular threat to the juvenile's physical safety or well-being." Pet. App. 75a. He acknowledged that, even though Petitioners did not avail themselves of Rule 5.2(a), the availability of that rule in other cases involving minor plaintiffs makes similar cases "likely not [to] recur in the future ...." Pet. App. 77a.

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[6] Rule 5.2(a) states:

> Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
>
> (2) the year of the individual's birth;
>
> (3) the minor's initials; and
>
> (4) the last four digits of the financial-account number.

FED. R. CIV. P. 5.2(a).

Judges Beezer, Graber, and Fisher—the members of the initial panel—concurred in the denial of rehearing *en banc* and wrote separately to respond to the dissenters. Pet. App. 90a-98a. With respect to Rule 5.2(a), the panel noted that the rule is discretionary (Pet. App. 92a), and that, in any event, no party had relied upon the rule "before the magistrate judge, the district judge, or in their respective briefs before this court" (Pet. App. 91a). The panel also explained that Petitioners' failure to invoke the rule was not surprising since "Rule 5.2 permits minors to proceed with their initials, not as 'Doe' or otherwise anonymously" (Pet. App. 91a) and "plaintiffs sought anonymity, not veiled identification" (Pet. App. 92a).

Apart from Rule 5.2(a), the panel rejected, as a "false choice," the dissenters' "rather Faustian choice between anonymity and civil rights litigation on one side, and disclosure and violence on the other." Pet. App. 92a. The panel stated that it "did not take lightly the possibility that civil rights litigation may be chilled by disclosure," but noted that the *Advanced Textile* test had been around since 2000 "with no apparent effect on civil rights litigation." Pet. App. 93a. The panel pointed out, moreover, that "the most important civil rights cases involving juveniles have all been cases where the plaintiffs used their real names, rather than pseudonyms." *Id.* The panel understood the dissenters' concern for Petitioners' safety as nothing more than their disagreement "with the district judge's factual finding that the Doe children do not reasonably fear severe harm" and reiterated that "a fair reading of the record reveals that the district court's factual finding was not clearly erroneous." Pet. App. 94a.

Finally, the panel again recognized that, while the vulnerability of juveniles "is certainly one [factor] that weighs in favor of anonymity ... it is still only one factor," and a plaintiff seeking to proceed anonymously must also "reasonably fear sufficiently 'severe' harm" to overcome the "almost universal practice of disclosure." Pet. App. 96a-97a (internal quotation marks omitted). Since the district court's finding that Petitioners did not reasonably fear severe harm was not clearly erroneous, the panel agreed that rehearing *en banc* was unwarranted.

REASONS FOR DENYING THE PETITION

Petitioners do not assert any conflict with this Court's decisions or any conflict with any decision of another court of appeals or state high court. Nor do Petitioners contend that this case gives rise to any issue of national importance warranting this Court's review. Petitioners rely solely on this Court's "supervisory power" as a basis to grant the petition. But this Court's supervisory power has been invoked as a basis for certiorari only when procedural questions of judicial administration are involved. This case presents no such question.

To the contrary, this case involves merely the standard application of well-settled circuit precedent by a district court to a narrow and unique set of facts, subject to standard abuse-of-discretion review by the court of appeals. Under that deferential standard, the court of appeals was correct in affirming the district court's denial of the motion to proceed anonymously. The panel properly deferred to the extensive factual findings by the magistrate judge and the district judge that Petitioners had no objectively reasonable fear of harm. Its decision is consistent with the strong public interest in "open courts" expressed in

the requirement in Fed. R. Civ. P. 10(a) that "[t]he title of the complaint must name all the parties." And the decision below is likewise consistent with Fed. R. Civ. P. 5.2(a), which Petitioners raise for the first time in this Court.

Petitioners should not be permitted to invoke this Court's supervisory power as a vehicle for a back-door attack on the merits of the district court's factual findings and exercise of its discretion. The petition presents no issue of significance beyond the narrow and highly specific circumstances of this case. The petition should be denied.

I. THE QUESTION PRESENTED DOES NOT IMPLICATE THIS COURT'S SUPERVISORY POWER

Conceding that they lack any standard basis to seek a writ of certiorari, Petitioners ask this Court to grant certiorari under its "supervisory power," arguing that the decision below "departed from 'the accepted and usual course of judicial proceedings.'" Pet. 15 (quoting SUP. CT. R. 10(a)). This rarely used basis for obtaining review, however, has no applicability in this case, where the question presented does not relate to the operation of the federal judiciary.

Contrary to Petitioners' intimations (Pet. 15), the "supervisory power" provision of Rule 10(a) is not a catch-all provision that sanctions review of perceived errors in the courts of appeals. Rather, it reflects this Court's "significant interest in supervising the *administration* of the judicial system." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (citing SUP. CT. R. 10(a)) (emphasis added). For example, in *Hollingsworth*, this Court granted a stay of a district court

order permitting audio and video broadcast of a bench trial to a number of federal courthouses. This Court concluded that the order was based on a local rule that likely had not been amended in compliance with federal law, *id.* at 710-12, and that certiorari would be appropriate because this Court's "interest in ensuring compliance with *proper rules of judicial administration* is particularly acute when those rules relate to the integrity of judicial processes," *id.* at 713 (emphasis added).

Similarly, in *Nguyen v. United States*, 539 U.S. 69 (2003), this Court acknowledged that it had granted certiorari "[i]n accordance with this Court's Rule 10(a) ... to determine whether the Court of Appeals had 'so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.'" *Id.* at 73-74 (quoting Pet. for Cert. in No. 01-10873, p.6; Pet. for Cert. in No. 02-5034, p.5). That case presented the question whether "the judgment of the Court of Appeals [was] invalid because of the participation of a non-Article III judge on the panel." *Id.* at 73. In electing to use its supervisory power despite the apparent absence of prejudice, this Court explained that "the error in these cases involves a violation of a statutory provision that 'embodies a strong policy concerning *the proper administration of judicial business*' ...." *Id.* at 81 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)) (emphasis added).

Thus, both *Hollingsworth* and *Nguyen* involved a procedural or operational issue as to how the federal courts are run. This case, in contrast, does not involve matters of judicial administration. It instead presents a straightforward dispute over the applica-

tion of Ninth Circuit precedent regarding rules of civil procedure for litigants, and a run-of-the-mill application of the abuse-of-discretion standard for appellate review.

Nor do the cases in which this Court has addressed "sound judicial practices" provide a basis for this Court to grant certiorari here. For example, in *Thomas v. Arn*, 474 U.S. 140 (1985), this Court addressed whether the Sixth Circuit had properly established a "prospective rule that failure to file timely objections [to a magistrate judge's Report and Recommendation] with the district court waives subsequent review in the court of appeals." *Id.* at 144-45. And in *United States v. Stanley*, 483 U.S. 669 (1987), the "judicial practice" at issue was whether the court of appeals could direct a district court to take action regarding a claim that was not part of an order certified for appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 676. Thus, unlike here, both *Thomas* and *Stanley* involved the internal operation of the federal judiciary.[7]

In short, the question presented here does not implicate this Court's "supervisory power," and Petitioners may not rely on this Court's Rule 10(a) in a

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[7] Petitioners' reliance on *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), is also perplexing, as there this Court granted certiorari "in view of the division among the Circuits on the question whether [28 U.S.C.] § 1782(a) contains a foreign-discoverability requirement," *id.* at 253, and ultimately "decline[d] ... to adopt supervisory rules" regarding § 1782(a) on the ground that "[a]ny such endeavor at least should await further experience with § 1782(a) applications in the lower courts," *id.* at 265. Here, there is no division among the courts of appeals, and, consequently, announcement of any "supervisory rule" would be premature.

disguised effort to ask this Court to correct a perceived error in the decision below. Because there is no asserted conflict among the courts of appeals, no asserted conflict with a past decision of this Court, and no asserted issue of national importance, the petition fails to present any plausible ground for certiorari.

II. EVEN IF THIS CASE DID IMPLICATE THIS COURT'S SUPERVISORY POWER, EXERCISE OF THAT POWER IS UNWARRANTED HERE

Exercise of this Court's "supervisory power" is warranted only where a decision "so far depart[s] from the accepted and usual course of judicial proceedings" as to necessitate this Court's intervention. SUP. CT. R. 10(a). Even if this case were within the scope of this Court's supervisory power, the court of appeals' decision does not come close to constituting such a departure. Petitioners contend that the decision below was "at odds with sound judicial practice" because it "overvalued" the public's right to "open courts" and "undervalued both the privacy and security concerns embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 15-16. But the balance between openness and privacy or security is merely an application of the merits test that settled circuit precedent applies to any motion to proceed anonymously. The magistrate judge, the district judge, and the court of appeals all adhered to the "accepted and usual course of judicial proceedings" in their application of that test, and that adherence gives no ground for the exercise of this Court's supervisory power.

A. The Decision Below Properly Respects The Public Interest In Open Judicial Proceedings Embodied In Fed. R. Civ. P. 10(a)

Rule 10(a) of the Federal Rules of Civil Procedure states that "[t]he title of the complaint must name all the parties," FED. R. CIV. P. 10(a)—a requirement Petitioners conspicuously fail to mention in contending that the decision below "overvalued" the public interest in "open courts." The courts of appeals have widely recognized that Rule 10(a), "though seemingly pedestrian, serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly." *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 188-89 (2d Cir. 2008); *see also Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("[W]e express our concern about the plaintiff's litigating under a pseudonym. Judicial proceedings are supposed to be open ... in order to enable the proceedings to be monitored by the public.") (Posner, J.) (internal citations omitted); *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) ("[Fed. R. Civ. P. 10(a)] protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.").

Contrary to Petitioners' suggestion (Pet. 17), Fed. R. Civ. P. 10(a) implicates far more than merely "a generalized, non-absolute, little delineated right of access to judicial records." As Judge Posner has put it, "[i]dentifying the parties to the proceeding is an important dimension of publicness. *The people have a right to know who is using their courts.*" *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.), *quoted in United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008)

(emphasis added). And as the Fifth Circuit has recognized, First Amendment principles are at stake when the public is precluded from knowing litigants' identities. *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("Public access to [plaintiffs' identities] is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings."); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public.").

These basic principles are not undermined by the fact that, on occasion, parties in other cases cited by Petitioners (Pet. 17-19) have consented to the use of pseudonyms. As Petitioners concede (Pet. 19), in none of the cited cases did the courts address the permissibility of filing anonymously, presumably because no party raised an objection. Thus, the most that can be gleaned from these cases is that the courts did not, *on their own motion*, reach out to decide the anonymity issue. These cases hardly amount to a "long-standing practice in this Court ... [or] in the lower courts" (Pet. 18), and they say nothing about the public's interest in "open courts."

Plaintiffs seeking anonymity to pursue education-related civil rights claims remain the exception, not the rule. There is a strong tradition of plaintiffs filing civil rights suits in their own names in the education context, no matter how controversial their cause. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (constitutional challenge to race-based admissions preferences at public law school); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (constitutional challenge to race-based admissions preferences at public

university); *Lau v. Nichols*, 414 U.S. 563 (1974) (constitutional and statutory challenge to public school system's failure to provide English language instruction to students of Chinese ancestry); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962) (constitutional challenge to racial segregation at the University of Mississippi).

This strong tradition extends to minors suing in their own names to vindicate civil rights in the education context. This Court's historic decision desegregating the public schools was captioned *Brown v. Board of Education*, 347 U.S. 483 (1954), not *Doe v. Board of Education*. *See also Runyon v. McCrary*, 427 U.S. 160 (1976) (Section 1981 challenge to whites-only admissions policies of two private schools in Virginia); *Lee v. Weisman*, 505 U.S. 577 (1992) (constitutional challenge to recital of prayer at public school graduation ceremony); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (constitutional challenge to recitation of Bible verse and prayer in public school); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (constitutional challenge to mandatory recital of pledge of allegiance in public school), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Similarly, as noted, many plaintiffs have sued in their own names when challenging preferences and entitlements for Native Hawaiians, both inside and outside of education. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000) (constitutional challenge to Hawaiian ancestry requirement for voting for trustees of Hawai`i's Office of Hawaiian Affairs); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007) (constitutional challenge to State of Hawai`i programs restricting benefits to "native Hawaiians" or "Hawaiians"); *Carroll v.*

Nakatani, 342 F.3d 934 (9th Cir. 2003) (constitutional challenge to provision of Hawai`i Constitution creating agencies that allocate benefits to Native Hawaiians); *Arakaki v. Hawai`i*, 314 F.3d 1091 (9th Cir. 2002) (constitutional and statutory challenge to requirement that trustees of the Office of Hawaiian Affairs be citizens of Hawaiian ancestry); *Kuroiwa v. Lingle*, 2008 WL 2622816 (D. Haw. July 3, 2008) (constitutional, statutory and common-law challenge to certain distributions by the Office of Hawaiian Affairs to Native Hawaiians). There is no indication that any of these plaintiffs has ever faced any reprisal, retaliation or other harm despite the controversial and emotionally charged nature of their challenges to preferences and entitlements for Native Hawaiians.

In fact, in 2003, when Petitioners' own lead counsel represented an eleven-year-old non-Native Hawaiian boy in a challenge to KS's admissions policy, the boy filed suit in his own name. *See Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, No. 03-cv-00441 (D. Haw.). Far from experiencing any violence, hostility or even ostracism at KS, Mohica-Cummings enjoyed such a warm welcome that his attorney, Mr. Grant (Petitioners' counsel of record here), stated in a televised interview that Mohica-Cummings was "doing great, he's enjoying himself, he's made a lot of friends and is fitting right in." 1 S.E.R. 86.

Against this backdrop, the lower courts did not depart from the usual course of proceedings in respecting the public interest in robust access to judicial proceedings.

B. The Decision Below Presents No Tension With Fed. R. Civ. P. 5.2(a)

Petitioners' belated invocation of Rule 5.2(a) provides no alternative ground for application of this Court's supervisory power. While Petitioners now fault the panel for "undervalu[ing] the child-protective policies embodied in" Rule 5.2(a) (Pet. 20), they never invoked that rule in the extensive proceedings before the magistrate judge, the district judge or the panel, or even when seeking rehearing *en banc*. Petitioners thus should be precluded from relying on Rule 5.2(a) at this late date. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). And, contrary to Petitioners' suggestion (Pet. 20 n.7), the panel did not "pass upon" the Rule 5.2(a) question in the decision that Petitioners ask this Court to review. This fact is not altered by observations made in an opinion concurring in the denial of rehearing *en banc*.[8]

Even if consideration of Rule 5.2(a) were proper at this stage, the rule has not reversed the presumption against anonymity where the plaintiffs are minors, as Petitioners erroneously suggest (Pet. 20). Rule 5.2(a) provides in relevant part that, "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains ... the name of an individual known to be a minor ... a party or nonparty making

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[8] As the panel noted in its concurrence in the denial of rehearing *en banc* (Pet. App. 91a-92a), Petitioners' failure to show any interest in Rule 5.2(a) below may be attributable to the fact that Petitioners sought near-complete anonymity in every aspect of the case—anonymity far exceeding the limited use of initials contemplated by the rule. *See* 2 E.R. 160 (interim protective order limiting disclosure of Petitioners' identities to seven individuals).

the filing may include only ... the minor's initials." FED. R. CIV. P. 5.2(a). But presumptively requiring the use of a minor's initials does not mandate the near-complete anonymity in every aspect of a proceeding that Petitioners sought here. Nor does it apply on its face to adults that are parties (nominally or otherwise) to the action along with a minor like the parent Petitioners here. The rule is not mandatory and may be overridden in a court's discretion. Nor does it apply to all aspects of a case, but only to those documents that are filed with the court.

Moreover, a party seeking more than the limited redactions that Rule 5.2(a) requires bears the burden of demonstrating why greater protection is warranted. *See* FED. R. CIV. P. 5.2(e) ("*For good cause*, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.") (emphasis added); *cf. id.* advisory committee's note (2007) ("While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected."). And there is no indication in the committee notes accompanying the rule or in any materials generated during the approval process that the rule was intended to supplant, or even affect, the existing body of law regarding plaintiff anonymity.

Thus, Petitioners greatly overstate Rule 5.2(a)'s purpose and effect when they suggest that the rule "provides for anonymity of juveniles in federal litigation" (Pet. 22 (quoting Pet. App. 71a)) or "mandates that both courts and parties 'safeguard the identities

of minor children' in federal litigation" (*id.* (quoting Pet. App. 69a).[9]

None of this is to say that Petitioners' status as minors is irrelevant or insignificant. To the contrary, it is an important factor in the anonymity balance that the lower courts carefully conducted in this case under governing Ninth Circuit precedent. The panel (Pet. App. 17a), like the magistrate judge (Pet. App. 58a) before it, specifically considered the potential vulnerability of the minor Petitioners, and concluded that that fact, standing alone, did not warrant permitting them to proceed anonymously here. That decision is sound and, as the panel itself explained on denial of *en banc* review (Pet. App. 90a-92a), is in no way undermined by the limited protections in Rule 5.2(a).

III. THE FACTUAL CIRCUMSTANCES PROVIDE NO WARRANT FOR THIS COURT'S REVIEW

Petitioners finally abandon all pretense of trying to fit this case within this Court's certiorari standards and "candid[ly]" argue that the "compelling factual circumstances" of this case supposedly distinguish this case from the thousands of other petitions this Court considers and warrant this Court's *sui generis* review. Pet. 24, 25. Should this Court even reach

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[9] While Petitioners correctly note that Rule 5.2 was the result of Congress's directive in the E-Government Act of 2002 that this Court "prescribe rules ... to protect privacy and security concerns relating to electronic filing of documents" (Pet. 21 (quoting 44 U.S.C. § 3501 note)), Petitioners are incorrect to suggest that either Rule 5.2 or the Act was designed to protect physical security. Rather, as is clear from the rule's title—"*Privacy Protection* For Filings Made with the Court"—it is intended to protect personal privacy.

this improper basis for requesting certiorari, Petitioners' overwrought and highly misleading account of the facts requires correction.

First, Petitioners misstate the record from the very first page of their petition by suggesting that any court in this case ever found that those who challenge KS's admissions policy "face 'undoubtedly severe' threats of physical retaliation." Pet. i (emphasis removed). No such finding was ever made in this case. To the contrary, the overwhelming evidence in the record showed that, as the magistrate judge and the district judge found, Petitioners' fears of any such retaliation were unreasonable. *See, e.g.*, Pet. App. 14a; Pet. App. 35a-36a; Pet. App. 56a-58a. This evidence included Petitioners' own concession that they never feared any harm from the KS community. *See* Pet. App. 7a; 1 S.E.R. 32c n.2. To call physical threats "undoubtedly severe" if actually made is not the same as finding that anyone ever made them. And the magistrate judge and the district judge specifically found that Petitioners' fears of physical retaliation were objectively unreasonable, negating Petitioners' incorrect and inflammatory suggestion that any such threats had ever been found to have materialized.

Second, Petitioners deem every anonymous and fleeting Internet comment a real and serious threat (Pet. 5-8, 26), ignoring the contrary factual findings made by the magistrate judge and the district judge sitting in Honolulu. In according proper deference to these findings, the court of appeals recognized that the magistrate judge and the district judge, who are closest to the Hawaiian community and to the controversy, are best situated to sort overheated hyperbole and nonsensical venting from any genuine or parti-

cularized threat directed against any actual person on the basis of non-Native Hawaiian identity.

Third, Petitioners grossly distort and exaggerate the record in stating that "the past several years in Hawaii have witnessed an extraordinary number of 'violent crimes with racial overtones.'" Pet. 6 (quoting Pet. App. 7a). Petitioners offered inadmissible hearsay evidence of only four such incidents occurring over a period of three years around Hawai`i as a result of "road rage" or school yard altercations. 2 E.R. 225-36. None of these incidents had the slightest connection to KS, its admissions policy, or this litigation. Petitioners' reliance on a few isolated and unrelated incidents of racially motivated violence to portray pervasive animus in Hawai`i against "haoles" is as groundless as it is offensive, and was properly discounted by the magistrate judge, the district judge, and the panel. The dissents from the denial of *en banc* review are equally groundless in suggesting that Petitioners' fears are justified by apocryphal stories about racially motivated violence in Hawai`i schools. *E.g.*, Pet. App. 67a-68a; Pet. App. 70a-73a. The magistrate judge and the district judge are best able to evaluate the credibility of such stories, and were well within their discretion in dismissing them as urban myth unworthy of belief and unrelated to any aspect of this case.

Last, Petitioners invoke the possibility of summary reversal, implicitly recognizing that the narrow, fact-bound issues presented here do not warrant this Court's plenary consideration. Pet. 27. Even if Petitioners' arguments for review had any merit (they do not), this case is not a candidate for summary reversal, as that route is generally reserved for those instances where the lower court has "contravened

this Court's clear precedents." *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010); *see also CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (summarily reversing where court of appeals committed "clear error" when applying a prior decision of this Court); *Allen v. Siebert*, 552 U.S. 3, 7 (2007) (summarily reversing where prior decision of this Court "preclude[d]" the "Court of Appeals' approach"); *Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006) (summarily reversing because error was "obvious" in light of prior decision of this Court). Here, Petitioners identify no decision of this Court with which the decision below conflicts. Any request for summary reversal is thus improper.

In short, this Court should reject Petitioners' last-ditch plea that this Court substitute its own factual findings and its own discretion for that exercised by a magistrate judge and a district judge, in ordinary proceedings, affirmed by the court of appeals under ordinary abuse-of-discretion review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 8, 2011

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(3)

Supreme Court, U.S.
FILED
APR 13 2011
OFFICE OF THE CLERK

No. 10-1100

In the Supreme Court of the United States

JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.

Petitioners

v.

KAMEHAMEHA SCHOOLS/ BERNICE PAUAHI BISHOP ESTATE, ET AL.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Respondents proudly admit that they operate a system of racially segregated private schools. Petitioners are four children who challenged respondents' racially exclusionary admission policy as a violation of 42 U.S.C. § 1981, the Nation's oldest civil rights law.

Although petitioners willingly revealed their identities to respondents under a protective order entered by the district court, petitioners otherwise sought to shield their identities from the public by litigating this action using pseudonyms. The court of appeals

> —acknowledged that individuals who challenge respondents' locally popular admissions policy face "undoubtedly severe" threats of *physical* retaliation;
>
> —found that any prejudice to respondents from permitting petitioners to use pseudonyms here was "minimal" or "doubt[ful]"; and
>
> —concluded that permitting petitioners "to use pseudonyms [would] serve the public's interest in this lawsuit by enabling it to go forward."

The court of appeals nevertheless affirmed the district court's refusal to allow petitioners to use pseudonyms and its consequent dismissal of petitioners' claims with prejudice.

The question presented is whether the decision of the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by [the district] court, as to call for an exercise of this Court's supervisory power." Rule 10(a).

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REPLY BRIEF FOR THE PETITIONERS

Petitioners Jacob and Janet Doe, Karl Doe, and Lisa Doe respectfully file this reply brief in support of their petition for a writ of certiorari.

ARGUMENT

Respondents contend that the petition does not invoke any recognized basis for jurisdiction on certiorari, that the Court should not exercise its supervisory power over the Ninth Circuit even if there is certiorari jurisdiction, and that the decision below is not really as bad as it appears. We address these contentions in turn.

I. This Case Directly Implicates the Court's Supervisory Power.

Far from "[c]onceding that they lack any standard basis to seek a writ of certiorari" (Opp. 14), petitioners in fact rely on the final clause of this Court's Rule 10(a), which encompasses lower-court decisions that "call for an exercise of this Court's supervisory power." *See, e.g.*, Pet. i (final paragraph). Respondents assert that this expressly recognized basis for obtaining review "has no applicability in this case, where the question presented does not relate to the operation of the federal judiciary." Opp. 14. Respondents' assertion is easily refuted.

Though necessarily bound up in a concrete dispute (as is every true "Case" or "Controversy" within the cognizance of Article III of the Constitution), the petition essentially asks the Court to clarify the circumstances in which a person may properly seek redress in federal court while using a pseudonym. In so asking, the petition doubtless implicates the "operation" of the federal judicial system. In other words, like *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010), and *Nguyen v. United*

States, 539 U.S. 69, 81 (2003), this case "involve[s] a procedural or operational issue as to how the federal courts are run" (Opp. 15), namely, the use of pseudonyms by litigants in those courts. Indeed, respondents acknowledge that the case presents a dispute "regarding rules of civil procedure for litigants." Opp. 16.

Respondents label this case "a straightforward dispute over the application of Ninth Circuit precedent." Opp. 15-16; *see also, e.g.*, Opp. 13 (asserting that "this case involves merely the standard application of well-settled circuit precedent"). In this regard, respondents apparently intend to invoke Rule 10's admonition that certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." But the petition clearly does not concede that any Ninth Circuit precedent "properly state[s]" the applicable law. To the contrary, the petition argues that the Ninth Circuit *mis*stated the law in two respects: it "overvalued what it called the public's generalized right to 'open courts,'" and it "undervalued both the privacy and security concerns embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 15-16.

It is undeniable that "procedural questions of judicial administration" (Opp. 13) are involved in this case and are presented by the petition for certiorari. Therefore, the case implicates the Court's supervisory power over the lower federal courts and, in consequence, the petition properly invokes the final clause of Rule 10(a).

II. Exercise of the Court's Supervisory Power Is Warranted.

As noted above, respondents treat this case as if it were governed by "settled circuit precedent," the application of which the petition merely seeks a "do over" in

this Court. Opp. 17. Not so. Whether or not the Ninth Circuit was faithful to its own precedent, the decision below was not faithful to the accepted and usual course of judicial proceedings or to sound judicial practice. In the following two sections, we revisit this infidelity as it relates to "openness" and to Federal Rule 5.2(a).

A. Openness

In discussing what the Ninth Circuit labeled "the public's right to open courts" (Pet. App. 11a), respondents begin with Federal Rule of Civil Procedure 10(a), which provides that "[t]he title of the complaint must name all the parties." Pet. 2. Citing this "seemingly pedestrian" requirement, *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 188 (2d Cir. 2008), the courts of appeals have bolstered what respondents call "the public interest in open judicial proceedings." Opp. 18 (section heading); *see also* Opp. 18-19 (discussing cases). Petitioners do not quarrel with these decisions, nor would petitioners leave the impression that they denigrate openness in judicial proceedings. To the contrary: the fact that "[f]or many centuries, both civil and criminal trials have traditionally been open to the public, *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979), *quoted in* Opp. 19, is a facet of our judicial heritage to be admired and encouraged.

But the question here is not whether this openness is generally desirable or valuable, but whether it is (as the Ninth Circuit held below) a "paramount" consideration against permitting pseudonyms. Pet. App. 18a. The above-quoted decision of this Court in *Gannett Co.* is instructive in this regard. Even as it acknowledged the long history of open trials, and even as it took pains not to "disparage the general desirability of open judicial

proceedings," the Court nonetheless affirmed the fact-specific closure of a particular pretrial proceeding. 443 U.S. at 393-94. Likewise instructive is Judge Posner's opinion in *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869 (7th Cir. 1997). Respondents emphasize his statement that the "people have a right to know who is using their courts." *Id.* at 872, *quoted in* Opp. 18. But respondents ignore his immediately following statement: "There are exceptions"; indeed, "fictitious names are allowed when necessary to protect the privacy of children . . . and other particularly vulnerable parties or witnesses." 112 F.3d at 872; *see also id.* (acknowledging with approval the fact that the "plaintiff is proceeding under a fictitious name" after having been granted leave to do so by the district court).[1]

In the end, the decisions citing Federal Rule 10(a) go no further than the authorities cited by the court of appeals, i.e., they establish a "generalized"—and more importantly—a "non-absolute" right to openness. *See* Pet. 17. Therefore, elevating this right to a *paramount* consideration against using pseudonyms finds no warrant in Federal Rule 10(a). To the contrary, the decisions discussed above show this sort of elevation to be a departure from the accepted and usual course of judicial proceedings.

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[1] Respondents' treatment of the Fifth Circuit's decision in *Doe v. Stegall*, 653 F.2d 180 (5th Cir. Unit A 1981), is similarly suspect. Respondents quote the court's generalized statement that "First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." *Id.* at 185, *quoted in* Opp. 19. But respondents ignore the court's actual *holding* that the district court "*must allow* the plaintiffs to proceed under fictitious names" in this particular case. 653 F.2d at 181 (emphasis added).

We come then to respondents' litany of cases, some of them similar to this one, in which the plaintiffs sued in their own names. *See* Opp. 19-21.[2] This litany proves very little. In the first place, as Judge Reinhardt aptly observed when the panel cited the same cases (*see* Pet. App. 93a-95a nn.1-3), "only two . . . involved minor litigants bringing suit in the post-1970s era, when courts have liberally allowed litigants to use Doe status." Pet. App. 89a n.11. Moreover, the fact that plaintiffs in *most* civil rights cases, even *most* challenges to racial preferences for Native Hawaiians, have used their own names cannot logically establish a categorical practice against the use of pseudonyms.

To the contrary, the numerous cases recited in the petition (*see* Pet. 17-19 & n.6), together with the cases helpfully added by respondents (*see supra* pp. 3-4 & n.1),

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[2] Among other cases, respondents point to *Brown v. Board of Education*, 347 U.S. 483 (1954), and [*James*] *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962). *See* Opp. 20. One might think respondents would hesitate to invoke the history of school desegregation as a ground for reassuring the Court that petitioners could not possibly face "any reprisal, retaliation or other harm." Opp. 21. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 13 (1958) (recounting and accepting the district court's findings that "the past year at [Little Rock] Central High School had been attended by conditions of 'chaos, bedlam and turmoil'"; and that "there were 'repeated incidents of more or less serious violence directed against the Negro students and their property'"); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 140 (1967) (citing "an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University").

show that federal courts (including this Court) simply do *not* treat "openness" as a *paramount* consideration against permitting pseudonyms. Instead, "the accepted and usual course of judicial proceedings" is to permit pseudonyms in those (admittedly rare) cases in which they are warranted by the case-specific facts.

B. Federal Rule 5.2(a)

The petition argues that if "the Ninth Circuit overvalued 'open courts' in the pseudonym calculus," it also "undervalued the child-protective policies embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 20. Accordingly, "even if there is a 'strong general presumption that plaintiffs will conduct litigation under their own names,' Rule 5.2(a) *reverses* that presumption in cases where the plaintiffs are minors." *Id.* (quoting Pet. App. 13a). Respondents have no good answer to this argument.[3]

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[3] Respondents half-heartedly seek to preclude consideration of Rule 5.2(a) on the authority of *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977), *cited in* Opp. 22. *Lovasco* said that, "[a]bsent exceptional circumstances, [the Court] will not review" an argument that "was not raised in the District Court or in the Court of Appeals." *Ibid.* More recently, however, the Court has repeatedly made clear that its practice "permit[s] review of an issue not pressed [below] so long as it has been passed upon." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) (quoting *Lebron v. National Passenger Railroad Corp.*, 513 U.S. 374, 379 (1995), in turn quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). Notwithstanding respondents' protestation to the contrary (*see* Opp. 22), the Ninth Circuit panel doubtless "passed upon" Rule 5.2(a) by construing the rule and by expressly concluding that the panel's affirmance of the district court was consistent with the rule. *See* Pet. App. 91a-92a; *see also* Opp. 12 (cataloguing the panel's extensive treatment of the rule).

After giving Federal Rule 10(a) the broadest possible reading, respondents then give Federal Rule 5.2(a) the most crabbed possible reading. In accord with the court below, respondents use the fact that the rule "may be overridden in a court's discretion" and applies "only to those documents that are filed with the court" (Opp. 23) as an excuse to render the rule a nullity in the context of protecting the anonymity of minors in federal litigation. *See id.* (arguing that Rule 5.2(a) was not "intended to supplant, *or even affect*, the existing body of law regarding plaintiff anonymity" (emphasis added)). This construction of the rule does no justice to either the Act of Congress or the Judicial Conference policy from which the rule derives. If the general "privacy and security concerns" of the statute or the specific minor-protecting aspect of the policy (*see* Pet. 21-22) are to have concrete effect, Rule 5.2(a) must do no less than what Chief Judge Kozinski says it does: "safeguard the identities of minor children" in litigation in federal court. Pet. App. 69a.

To observe that "[t]he rule is not mandatory" in all circumstances (Opp. 23) does not meet the point. Petitioners do not contend that Rule 5.2(a) alone mandated that they be permitted to use pseudonyms. They contend instead that the rule necessarily erases (in cases brought by minors) the "presumption against anonymity" (Pet. App. 98a) applied by the Ninth Circuit panel. In applying that presumption in the teeth of Rule 5.2(a), the panel departed from sound judicial practice.

Moreover, respondents have no response to the point that "'[o]nce a federal claim is properly presented, a party can make any argument [in this Court] in support of that claim; parties are not limited to the precise arguments they made below.' Thus, petitioners may argue from Rule 5.2(a) even though they did not make that argument below." Pet. 20-21 n.7 (quoting *Citizens United*, 130 S. Ct. at 892).

III. The Factual Circumstances Are Indeed Compelling.

The petition argues that "compelling factual circumstances warrant review," for "[o]nce the Ninth Circuit's erroneous 'presumption against anonymity' as well as its unjustified elevation of 'open courts' are rightly set aside, there is literally *no credible basis* for denying petitioners the use of pseudonyms in this case." Pet. 25. Before addressing respondents' four challenges to this general proposition, it is worth highlighting three discrete points that respondents do *not* challenge.

One, respondents do not contest that "[a]part from open courts, all of the public interest considerations identified by the court of appeals favored *petitioners*." Pet. 25 (citing Pet. 9). Two, respondents do not deny that they would effectively suffer *no* prejudice were petitioners permitted to use pseudonyms. *See id.* Three, respondents do not deny that "no court is likely to have an opportunity to address the legality of respondents' racially exclusionary admissions policy"—an "important [issue] in its own right"—if children "who would challenge that policy are forced to run the gauntlet of public harassment and retaliation entailed by the decision below." *Id.*

This brings us to respondents' four points.

First, respondents argue that petitioners "misstate the record" with respect to whether that record reveals " 'undoubtedly severe' threats of physical retaliation." Opp. 25. But after describing the threats on which petitioners based their motion for leave to use pseudonyms, the panel stated: "These threats of physical retaliation are undoubtedly severe." Pet. App. 14a; *see also id.* at 70a-71a (Reinhardt, J., joined by Kozinski, C.J.) ("The minor litigants, whose names had not yet been disclosed,

were subjected to what even the panel terms 'threats of physical retaliation [that were] undoubtedly severe.'"). Moreover, regardless of whether there was any formal "finding" in this regard (Opp. 25), the threats documented in the petition—recall "kill haole day everyday," "break . . . every bone," "baseball bats or guns," "violent crimes with racial overtones," "stringing up those scum lawyers," "get the lickins' you deserve," and "beat the crap out of you," Pet. 5-8—*are* undoubtedly severe.

Second, respondents chastise petitioners for assertedly "deem[ing] every anonymous and fleeting Internet comment a real and serious threat," while "ignoring the contrary factual findings made by the magistrate judge and the district judge sitting in Honolulu." Opp. 25. In fact, the petition did not ignore those "findings"; it duly reported the court of appeal's ruling that the "district court did not abuse its discretion in concluding that the Doe children's fears of severe harm are not reasonable." Pet. 10 (quoting Pet. App. 14a). But if not already made clear, petitioners respectfully submit that such findings are *clearly erroneous*. *Cf.* Appellants' Opening Brief 24 (filed June 22, 2009) (arguing that the "ruling that *none* of [petitioners'] evidence is probative of a severe threat of harm or a reasonable fear of harm was a clearly erroneous assessment of the evidence" (internal quotation marks and citation omitted)).

But in any event, petitioners' argument for employing pseudonyms is hardly grounded on "anonymous and fleeting Internet comment[s]." As petitioners attempted to explain to the lower courts, comments that might be dismissed as mere "overheated hyperbole and nonsensical venting" (Opp. 25) when made in isolation, took on an ominous character when made in a context that "includes random acts of racial violence against non-Native

Hawaiian children . . . amplified by calls for 'kill haole day everyday,' when a non-Native was recently admitted to Kamehameha." Pet. App. 16a. The hypothesized fact that "the magistrate judge and the district judge . . . are closest to the Hawaiian community" (Opp. 25) does not excuse their error in failing to perceive this point.

Third, respondents would discount what the panel of appeals called "violent crimes with racial overtones committed by Native Hawaiians against non-Natives." Pet. App. 7a.[4] In some of these crimes, the court accurately observed, "young children severely injured their non-Native classmates, calling the victims derogatory names related to their skin color, especially 'f—— haole.'" *Id.*; *see also* 2 E.R. 225, 234-35 (documenting dislocated jaw, black eye, and head gash suffered by young girls). Respondents would have petitioners take solace in the fact that there were "only four" such racially-tinged attacks in recent years and that none of the attacks "had the slightest connection to [Kamehameha Schools], its admissions policy, or this litigation." Opp. 26. But when petitioners are the victims in what respondents dismiss as mere "school yard altercations" (*id.*), will these fine distinctions be a comfort to their parents?

Ultimately, respondents argue (and the lower courts concurred) that reasonable parents would have ignored the reported race-based crimes against schoolchildren

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[4] Respondents would blind the Court's eyes to these violent crimes with racial overtones on the ground that the record evidence thereof is "inadmissible hearsay." Opp. 26. Petitioners rebutted that evidentiary objection in the district court, *see* Plaintiffs' Reply Memorandum of Law 7 n.5 (filed Oct. 13, 2008), and no judge ever sustained that objection. Indeed, respondents' answering brief in the court of appeals did not even mention the point.

as "apocryphal stories" or "urban myth." *Id.* Chief Judge Kozinski—in admitting that "[i]f threats like that were made against me or my family, I'd be worried," and "I'd call the U.S. Marshals" (Pet. App. 67a)—holds the far more sensible view.

Last, respondents argue that "this case is not a candidate for summary reversal." Opp. 26. Petitioners are indifferent to whether the Court's consideration is summary or plenary. On the one hand, summary reversal is appropriate because the Ninth Circuit did indeed commit "clear error," Opp. 27 (quoting *CSX Transportation, Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009)), and that court's error is indeed "obvious," *id.* (quoting *Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006)). On the other hand, full briefing and argument would afford the Court the opportunity to give sustained attention to an issue that it has not expressly addressed in many, many years, if ever. In either event, review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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April 2011